

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2014-404-1219  
[2015] NZHC 1701**

BETWEEN                      PROBLEM GAMBLING FOUNDATION  
   OF NEW ZEALAND  
   Plaintiff

AND                              ATTORNEY-GENERAL  
   Defendant

Hearing:                      22, 23 and 24 September 2014

Appearances:                M Chen and A Van Houtte for the Plaintiff  
   M Andrews and S Shaw for the Defendant

Judgment:                    23 July 2015

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**JUDGMENT OF WOODHOUSE J**

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*This judgment was delivered by me on 23 July 2015 at 3 pm.  
pursuant to r 11.5 of the High Court Rules 1985.*

*Registrar/Deputy Registrar*

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## **Introduction**

[1] The Problem Gambling Foundation of New Zealand seeks judicial review of a decision of the Ministry of Health relating to provision of services to reduce problem gambling and treat problem gamblers.

[2] The Foundation is a charitable trust. It is a non-profit organisation which provides both public health and clinical problem gambling services. In broad terms, public health services are those designed to prevent or reduce the risk of problem gambling, and clinical services are those concerned with the treatment of problem gamblers. The Foundation has provided problem gambling services since 1988 and has been the largest service provider in New Zealand.

[3] Since 2004 the Ministry of Health has been the Government department with responsibility under the Gambling Act 2003 (the Act) for developing, managing and implementing an “integrated problem gambling strategy”.<sup>1</sup>

[4] In July 2013 the Ministry issued a Request for Proposal (RFP). This was for provision of services in 13 regions in New Zealand, and nationally, for a 30 month period commencing on 1 January 2014 and concluding on 30 June 2016.

[5] The Foundation submitted two proposals. One was to provide services, as the sole provider, in 9 of the 13 regions. The other was to provide national services in conjunction with another provider. In March 2014 the Ministry decided that no contract should be offered to the Foundation other than two small contracts for specialised Asian services in the Auckland and Canterbury/West Coast regions.

## **Outline of the Foundation’s claims and reformulation of the issues**

[6] The Foundation filed an amended statement of claim shortly before the hearing commenced. Two causes of action were pleaded. The first was described as “mistake of fact/decision not supported by probative evidence”. The second was described as “breach of natural justice/procedural expectation”. The pleading of

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<sup>1</sup> Gambling Act 2003, ss 317-318.

each cause of action provided detailed particulars of alleged errors in the decision making process and breaches of a legitimate procedural expectation.

[7] In the course of submissions the key issues were refined by Ms Chen for the Foundation. She submitted that there were seven key issues. Mr Andrews, for the Ministry, accepted Ms Chen's summary. For reasons noted below, I consider that it is appropriate to consider the issues under four main headings, rather than seven, but because of the agreement between counsel, and to provide an indication of the way in which the case was argued, I will set out Ms Chen's summary in full. It is as follows:

1. Can this Court review the Ministry's decision on the purchase of regional / national services from specific providers, and if so, for what types of breaches?
2. Did the Ministry fail to adequately mitigate the impact of conflicts of interest of some of the panel members who participated in the Panel scoring process (which formed the basis for the Panel recommendations which are set out in the Panel recommendation memo that was largely adopted by Mr Bartling in making his decision), such that the Ministry's decision was contaminated?
3. Did the Ministry breach [the Foundation's] legitimate expectation that the Ministry would follow the RFP and not make material changes to the criteria for evaluating proposals without giving notification of the change and allowing [the Foundation] and all other providers the opportunity to modify their proposals?
4. Did the Ministry breach its voluntarily adopted Mandatory Rules of Procurement concerning conflicts and the notifying of material modifications to the scoring criteria such that it constitutes an error or law?
5. Whether the Ministry's decision was not based on evidence of some probative value that tends logically to show the existence of facts consistent with the decision?
6. Was the decision based on material mistakes of fact?
7. Did the Ministry fail to take reasonable steps to acquaint itself with the relevant information in order to make a probative decision, including on [the Foundation's] Lead Agency Proposal?

[8] I restate the main issues under four headings because there is a degree of overlap between some of the issues as outlined by Ms Chen. The overlap, in large measure, is in relation to matters of fact and assessing the issues under four headings

is a more convenient focus. There is also Ms Chen's fourth issue relating to the Mandatory Rules of Procurement, which I will refer to as "the mandatory rules". The mandatory rules were binding on the Ministry in respect of the RFP and the decision making of the Ministry that followed. The two categories of rules referred to in the summary of the fourth issue, concerning conflicts of interest and modifications to the scoring criteria, are directly relevant to the subject matter, if not the precise legal categorisation, of the second and fourth issues.

[9] The restatement, including a different sequence, is as follows:

- (a) Issue 1. On what grounds, if any, can the decision be judicially reviewed? It was not disputed that, as a matter of principle, the decision is subject to the Court's jurisdiction. The issue is the scope of review. This issue requires consideration of the Court of Appeal's decision in *Lab Tests Auckland Ltd v Auckland District Health Board*.<sup>2</sup>
- (b) Issue 2. This corresponds to the third issue in Ms Chen's summary, and part of the fourth: Did the Ministry fail to follow evaluation processes and criteria set out in, or indicated by, the RFP and, if so, did it breach the mandatory rules, or a legitimate expectation of the Foundation, that in the absence of notification and an opportunity to respond, those processes would be adhered to?
- (c) Issue 3. This corresponds to issues 5 to 7 in Ms Chen's summary. The Ministry used a panel of six people to evaluate proposals with a seventh person who chaired the panel. The panel's decision making was sequential, with provisional conclusions reached at various stages. The essence of issue 3 is whether there were material errors in conclusions reached at various stages, such that the Ministry's final decision was not the result of logical and reliable decision making. The main thrust of the Foundation's evidence and submissions, to be considered under this heading, is that in various ways the panel's evaluation methodology

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<sup>2</sup> *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.

was flawed, and flawed to an extent which makes results at various stages unreliable, so that the final decision is unreliable.

- (d) Issue 4. This corresponds to Ms Chen's second issue, but incorporating issues relating to the mandatory rules. The broad issue is whether the decision should be set aside because of apparent bias, or apparent conflicts of interest, of panel members, or the panel as a whole. The mandatory rules include rules relating to conflicts of interest.

## **Conclusion**

[10] I have concluded that the decision in this case is one which may be subject to the full scope of judicial review so that the Foundation is entitled to advance the grounds contained in issues 2, 3 and 4. I have further concluded that, on all three issues the Foundation has established grounds to set the decision aside and that the decision should be set aside. My reasons follow.

## **Background**

[11] Under s 317 of the Act, the Government has allocated responsibility for an integrated problem gambling strategy to the Ministry. The strategy must address four matters specified in s 317(2). Those of relevance in this case are: (a) measures to promote public health by preventing and minimising the harm from gambling; and (b) services to treat and assist problem gamblers and their families and whānau. Those two types of service were referred to in the RFP, and in the course of these proceedings, as "public health" and "clinical" services.

[12] The Ministry is required to develop the strategy in consultation with, amongst others, representatives of organisations involved in providing various gambling facilities and representatives of providers of problem gambling services. A proposed strategy is then submitted to the Gambling Commission and the responsible Ministers.<sup>3</sup> In order to fund the strategy, the Government can charge gambling operators a levy.<sup>4</sup> The Act does not prescribe how the strategy is to be delivered.

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<sup>3</sup> Section 318.

<sup>4</sup> Section 319.

The Ministry may do so itself or, as is its practice, contract other providers. The statutory provisions are discussed more fully when considering issue 1.

***The current six year strategic plan and three year service plan***

[13] To comply with its statutory obligations the Ministry adopts a six-year strategic plan and two three year service plans. The current six year strategic plan is for the years 2010 to 2016. This was finalised in 2010 after an extensive consultation process. The Foundation participated in this. The first of the three year service plans was also finalised in 2010 following extensive consultation.

[14] The second three year service plan, for the years 2013 to 2016, is the one which led to the RFP and to the decision now challenged (the 2013-2016 service plan). The Ministry convened meetings on the initial consultation document for the current service plan. The Foundation attended several of those meetings and made submissions.

[15] The 2013-2016 service plan was approved by the Cabinet on 15 April 2013. It was published on the Ministry's website on 23 May 2013. It contains the following statement in a section dealing with public health:

The Ministry currently contracts 20 service providers to deliver primary prevention services for any combination of the public health service specifications. Based on current service delivery and the regular monitoring of service providers, the Ministry considers it advisable to broadly maintain its current arrangements with public health service providers for the time being. Minor amendments might be made where the 2012 needs assessment, modelling and achievement of service delivery targets suggest they are appropriate.

***The Request for Proposal***

[16] On 24 July 2013 the Ministry issued the RFP which led to the process with which this proceeding is concerned. This was a request for proposals to provide services for a 30 month period from 1 January 2014 to 30 June 2016. This was a new process for selecting organisations to be offered contracts to provide public health and clinical problem gambling services. The RFP was not a process contract; that is to say, it did not give rise to any contractual rights or obligations.



[17] The RFP recorded eight principal criteria against which proposals would be evaluated. Each criterion was given a weighting. This was recorded as a percentage of the total for all eight criteria. Sub-criteria were specified in respect of each of the main criteria. Some of the Foundation's claims, and the Ministry's responses, require detailed consideration of those parts of the RFP relating to the evaluation process. Because of the need for this detailed scrutiny, the most relevant parts of the RFP have been reproduced as appendix 1 to this judgment.<sup>5</sup> There is a discussion of the most relevant parts of the RFP later in this judgment, when dealing with issue 2.

### ***Receipt of proposals***

[18] Submitters were given seven weeks to complete their proposals. The due date was 11 September 2013. The Ministry managed the RFP using an online system known as GETS. It received questions about the RFP, and it posted its answers online for all submitters to see. The Ministry received 32 proposals in 86 "service mix configurations". Some proposals were immediately excluded for failing to comply with the RFP timetable.

[19] The Foundation submitted two proposals. Both were accepted for evaluation. One, referred to as "the standalone proposal", was to provide services, as the sole provider, in nine of 13 regions. The proposal was to provide all services required in each of the nine regions apart from Kaupapa Māori services. The second proposal, described as "the lead agency proposal", was to provide all services nationally in conjunction with another service provider, Hapai te Hauora Tapui Ltd.

### ***The panel process***

[20] Mr Natuitasina Levy was appointed chair of the Ministry's evaluation panel. At the time Mr Levy was a senior contract manager in the Gambling Harm Minimisation Team at the Ministry. Mr Levy's role was described as "the non-scoring" chair of the panel. The remaining six members were "scoring members". The composition of the panel was not finalised until 12 September 2013. This was

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<sup>5</sup> These parts of the RFP have been reproduced digitally. As a result the page numbers of the reproduced parts differ from the original page numbers. The first page of appendix 1 has a footnote numbered 68. This was in the original document as footnote 1.

the first scheduled date, as recorded in the RFP, for review and consideration of proposals.

[21] There were three main decision making stages in the panel's evaluation, resulting in a recommendation to the Ministry officer responsible for making the final decision, Mr Rodney Bartling. Although Mr Bartling was the responsible officer, the Ministry accepts that, if there were material errors in respect of the three broad categories of breach as alleged by the Foundation, these were not cured by the fact that the formal decision was made by Mr Bartling. The three decision making stages of the panel were described as "pre-scoring" (stage 1), "consensus scoring" (stage 2) and "moderation" (stage 3). There were also some preliminary steps and other relevant actions between the stages. The three stages, and the other steps, are described in the following paragraphs under appropriate subheadings.

#### *Distribution of evaluation packs*

[22] On 13 September 2013 each of the scoring panel members was provided with an "evaluation pack". The evaluation pack included a seven page explanatory document. Panel members were advised that the evaluation pack contained the information they needed to evaluate the proposals. Panel members were given seven further documents, which included the RFP. Several of these other documents were to be used by each panel member to score each proposal by reference to the eight principal criteria and weightings set out in the RFP. Panel members were also provided with electronic spreadsheets to be used for scoring each of the proposals.

[23] There were detailed instructions about scoring. Reference was made to a document described as "Summary of Individual Question Weightings". The most relevant part of this document has been reproduced as appendix 2 to this judgment. I will refer to this as "appendix 2". As may be seen, the left hand column records eight criteria and the next column records weightings for each of those criteria. The criteria (apart from abbreviations) and weightings are the same as those recorded in the RFP. Aspects of this document are discussed more fully when considering issue 2.

[24] The introduction to the evaluation pack, after reference to appendix 2, set out the detailed instructions to the panel members as to how they were to proceed with scoring each proposal. The instructions were reasonably prescriptive. They included the following:

- h There are 8 key criteria groupings: ...
- i The sum of the 8 criteria groupings total 100%.
- j Within each criteria grouping there are between 1 and 10 questions. Each question under a criteria group has a sub-weighting. Sub-weightings for each criteria group total 100%.
- k The weighting information is provided for your reference. It cannot be adjusted.
- l The summary of individual question weightings lists the relevant question(s) to be considered within each proposal to assess a score. Please refer to the sheet to assist your assessment.
- m Please also refer to the Scoring System sheet when completing your assessments. Scores are to be completed out of 10. A description of how questions should be assessed is provided on this sheet. Note that odd numbers and half marks are not acceptable.

...

[25] The Scoring System sheet referred to in paragraph m was as follows:

<b>Scoring System</b>		
The scoring system to be used to score each of the tenders is set out below:		
<b>Scoring (out of 10)</b>	<b>Response</b>	<b>Description</b>
10	Fully answers the question, exceeds requirements and tangible additional benefits achievable	Excellent
8	Fully answers the question, meets requirements	Superior
6	Mostly meets requirements; or will meet requirements with some further work	Good
4	Will only meet requirements with extensive further work	Poor
2	General assertions without substance, or is too vague to be meaningfully interpreted	Very Poor
0	No response or extremely poor	Unacceptable
Odd numbers and half-marks are <u>not</u> acceptable.		

[26] There were instructions in relation to confidentiality and conflicts of interest. Panel members were asked to complete a conflict of interest declaration, with instructions that any declared conflicts, actual or potential, were to be made known to the panel for its consideration. Five of the seven panel members declared actual or potential conflicts of interest or bias. Particulars in that regard are outlined when dealing with issue 4.

*Evaluation process: stage 1 – “pre-scoring”*

[27] Equipped with the evaluation pack, and the electronic provider RFP evaluation tools for each proposal, the panel members proceeded individually to score each proposal in accordance with the instructions given. For this purpose the explanatory note included the following instructions and advice:

- s Where possible, it is strongly recommended that panel members assess all proposals per region in a single sitting to increase consistency of scoring without any external third party influence.
- t Please read through ALL proposals as this will assist with the evaluation process and to take note of any particular:
  - relative strengths and weaknesses
  - any further questions you would like to ask the proposer
  - do not discuss your opinions with other panel members before the meeting

[28] Each panel member then sent their pre-score assessments to Mr Levy.

*Compilation of individual pre-scores by Mr Levy*

[29] In preparation for the first meeting, Mr Levy copied the individual pre-scores for each proposal into a comprehensive spreadsheet. In this process there was an automatic calculation of what was described as the “average score” for each proposal, with the result described as a “raw score”, in respect of each criterion.

[30] Some of the panel members did not record any score for some proposals or for some criteria. In some instances the panel member made no entry at all in the relevant part of the electronic spreadsheet; that is to say, it was left blank. In other instances text was entered, such as “N/A” or “did not score”. In evidence and

submissions these were referred to as “missing values” and the treatment of them by Mr Levy was one matter in issue. The Foundation in its evidence identified 340 missing values. The Ministry accepted that there were in fact 347 missing values. Mr Levy’s evidence was that “in almost all cases” he entered zeroes for missing values and electronically highlighted these zeroes with various colours. Mr Levy said that in two instances he corrected what he considered were “obvious typographical errors” where one of the panel members had entered a score of 88 out of 10. Mr Levy changed these scores, which related to a sub-criterion, to 8 out of 10.

*First panel meeting: preliminary discussion: conflicts of interest*

[31] The first panel meeting was delayed to 30 September 2013. At the start of the meeting Mr Levy reviewed each panel member’s conflict of interest and confidentiality form. When a conflict of interest, or potential bias, was declared, Mr Levy discussed the matter with the individual member and both signed the Ministry’s conflict form. The matter was also discussed with the panel. Mr Levy’s own declaration was reviewed by Mr Bartling. The detail is noted when considering issue 4.

*Evaluation process: stage 2 – “consensus scoring”*

[32] After dealing with conflicts of interest and other matters described in the agenda as “Procedural” (and for which 10 minutes had been allocated in the indicative agenda), the panel moved to the second stage of the evaluation, described by Mr Levy as “consensus scoring”. This began with Mr Levy’s projecting onto a screen the spreadsheet master files for each region. As he said in his affidavit, this meant that each of the panel members could see the raw scores of every panel member, for each proposal, on each criterion, and could see the average of the raw scores, for each proposal, on each criterion.

[33] A preliminary step at this point was to deal with the zero entries Mr Levy had made for missing values. The broad thrust of the evidence is that all of these zero entries, other than some in pre-scoring by one panel member, Mr Pereira, were altered following what Mr Levy described as a “discussion with the relevant Panel member”. The zero score was changed to the score agreed in this discussion. There

were zero entries in Mr Pereira's pre-score for a proposal from Raukura Pacific. Zero entries were made for Raukura Pacific's proposal because of a declared conflict of interest and an arrangement that Mr Pereira should not score the Raukura Pacific proposal. No adjustment was made to these zero entries and no adjustment was made to the average of the scoring by all panel members, which included Mr Pereira's zero scores.

[34] There was a good deal of evidence on the consensus scoring process, but very little in the way of contemporaneous and detailed minutes of discussions. A substantial body of the evidence is expert opinion evidence for the Foundation, and opinions in response for the Ministry, on aspects of this process. The essence of consensus scoring was that the panel as a whole agreed on single scores for the criteria for each proposal. The panel came to an overall view of what the appropriate score for each proposal should be. This meant that some panel members changed their scores. As Mr Levy noted, there were some substantial differences between panel members in their pre-scoring. He said that in his experience "this is usual". There is expert evidence for the Foundation from a statistician, Mr Peter Mullins, to the effect that substantial differences are most unusual. This is discussed in issue 3.

[35] Mr Levy said that an important objective of the evaluation was to confine assessments to the information contained in the proposals. He said:

64. Panel members agreed at the outset of the Consensus scoring stage that my role as the non-scoring Chair of the Panel was to facilitate the process, ensuring that any discussion referred back to information actually in the proposal concerned. This is a standard approach in procurement processes.
65. The reason for this is that an important objective of contestable processes like this RFP is to ensure, as much as possible, a level playing field for all respondents. The RFP attracted proposals primarily from incumbents like the plaintiff and the Salvation Army, but also from providers which the Ministry had not previously contracted with in this sector. Evaluating proposals by reference to the evidence respondents put forward in their proposals, rather than by reference to other factors such as external knowledge of their historical performance, is a mechanism used to ensure that incumbency is not favoured and in effect given weight beyond that provided for in the weighted criteria.

[36] Mr Levy noted in his evidence that he did make some errors in producing the consensus score spreadsheets. He said that all but one of these were trivial and, in his opinion, none disadvantaged the Foundation.

*Evaluation process: stage 3 – “moderation”*

[37] The third, and final, stage of the panel’s assessment was described as “moderation”. This stage was the subject of extensive criticism by expert witnesses for the Foundation. It is a stage in the evaluation process – the decision making by the panel – that is considered when dealing with issue 2, although it has relevance in a different way to issue 3. Some of the evidence relating to the moderation stage is set out in the section dealing with issue 2. It is sufficient at this point to record Mr Levy’s description of it as a “collective view” by the panel in which it “looked beyond the terms of the proposals”. The scores of each proposal, as recorded at the end of the consensus scoring stage, were not altered, but rankings were altered.

*The outcome of the panel evaluation process*

[38] The outcome of the panel process was recommendations to Mr Bartling. The Foundation’s proposals were rejected, essentially in their entirety. The panel recommended that the Foundation have only a limited secondary role in Gisborne and Canterbury. On 19 October 2013, Mr Levy emailed a memorandum containing the panel’s draft recommendations (the recommendation memorandum) to panel members for their approval.

***Further steps by the Ministry leading to the final decision***

[39] On 23 October 2013 Mr Levy orally briefed Mr Bartling on the panel’s recommendations. Mr Bartling said, in effect, that he recognised the implications for the Foundation because the Ministry, since 2004, had been purchasing “a significant volume” of services from the Foundation and he knew that the Foundation had a “significant profile before 2004”. He said that if he accepted the recommendations that “could bring about significant change within the sector”. Mr Bartling sought assurances that the recommendations were a true reflection of the panel’s consensus

and that the conflicts of interest were adequately managed. Mr Levy confirmed both matters.

[40] Notwithstanding Mr Levy's assurances, Mr Bartling decided to seek what he described as "additional reassurance that the process met good practice standards for government procurement processes". This was because he knew that the Foundation was the largest provider of problem gambling services, in terms of FTEs (full time equivalents), and with a service delivery presence in most regions in New Zealand. He therefore recognised the implications for the Foundation. Mr Bartling said he sought advice from the Ministry's procurement team about the robustness of the process that had been followed. He did not say what that advice was, but following this Mr Bartling decided that it was appropriate to procure an external review. This led to the appointment, in early November 2013, of PricewaterhouseCoopers (PwC) to provide an independent retrospective "probity report" on the RFP process. At about the same time the Ministry extended the existing contracts to give PwC sufficient time to complete its review.

[41] PwC began its enquiry on or about 14 November. Approximately six days later PwC advised the Ministry that the panel's recommendation memorandum, earlier sent by Mr Levy to Mr Bartling, required amendment to describe the moderation process more fully. This resulted in the addition of what became appendix 7 to the recommendation memorandum. Relevant detail in this regard is noted in the discussion of issue 2. PwC issued a draft report on 29 November 2013.

[42] A final panel recommendation memorandum was sent to Mr Bartling on 31 January 2014.

[43] On 13 March 2014 PwC, having received some further amended documents from Mr Levy, provided its final probity report. Some aspects of the report are noted later in this judgment. In its draft report, PwC had noted some "exceptions". The essence of the final report was that there were no exceptions remaining in relation to the panel's evaluation processes, but there was an observation about perceptions of conflict of interest which will be noted when dealing with issue 4.



[44] Mr Bartling's final decision was made on 13 March. It was consistent with the panel's recommendations apart from some minor variations.

[45] There were meetings between Ministry representatives and representatives of the Foundation on 20 and 28 March 2014. There is some conflict in the evidence between Foundation witnesses and Ministry witnesses as to what was said, in particular in relation to the Foundation's lead agency proposal. It is unnecessary to summarise those matters at this point. The Ministry did seek to negotiate with the Foundation to secure it as a provider of Asian services, something that had not been recommended by the panel. This had not been pursued by the Foundation in any material way when, in May 2014, it advised its intention to seek judicial review. The Ministry then extended existing contracts pending determination of the proceeding.

## **Evidence**

[46] In the usual way, on applications for judicial review, the main sources of evidence were the documentary record and affidavits for the parties. The documentary record was in 17 volumes and just short of 5,000 pages. There was affidavit evidence from nine witnesses, five for the Foundation and four for the Ministry.

[47] The Ministry challenged the admissibility of some evidence given by each of the Foundation's witnesses. I have been able to reach a conclusion in favour of the Foundation without having regard to any of the evidence in issue. For that reason it is unnecessary to discuss the issues, but I record that a number of objections were well founded.

[48] There was one witness of primary fact for the Foundation, its Chief Executive Officer, Mr Graeme Ramsey. He provided relevant background evidence relating to the Foundation's substantial and successful involvement in the provision of public health and clinical problem gambling services from the establishment of the Foundation in 1988. He provided further evidence of the Foundation's dealings with the Ministry, and specifically dealings relating to the RFP.

[49] The remaining four witnesses for the Foundation gave evidence principally, or entirely, as expert witnesses. The evidence of one of the expert witnesses, Mr Peter Mullins, has been central to my conclusions on issue 3, and of some significance for issue 4. The reasons for this are recorded when considering the issues. Mr Mullins has expertise as a statistician. His expertise was not challenged and for that reason it is unnecessary to record details, other than to note that his experience has been acquired over some 40 years, both as an academic and as a consultant statistician.

[50] A second expert witness for the Foundation, whose evidence has been of assistance to me in respect of some issues, is Dr Denis Jury. Dr Jury's most relevant expertise is in the design and management of competitive purchasing processes, including tenders and requests for proposals, for public bodies. He has a Doctorate in Biochemistry and a Master of Business Administration, with other science qualifications. He worked as a scientist from 1977 to 1993, when he moved into health management. He had extensive experience in different roles in health management in the Waikato from 1993 to, it appears, 1999. In 2003 Dr Jury joined the Auckland District Health Board as the General Manager of Planning and Strategy, reporting to the Chief Planning and Funding Officer. He became Chief Planning and Funding Officer in February 2004 and reported to the Chief Executive. He was responsible for health funding and planning for the Auckland District Health Board with an annual revenue of around \$1.9 billion. Approximately \$600 million of that was used for contracting services with non-governmental organisations and private health service providers. There was a significant number of contracts which ranged in size from less than \$100,000 to in excess of \$70 million and which were subject to tender and assessment processes. Dr Jury was the Chief Planning and Funding Officer until 2014.

[51] The remaining witnesses for the Foundation were Dr Peter Adams and Dr Charles Livingstone. Both have expertise in matters relating to problem gambling, but their admissible evidence has generally not been relevant to the issues I have identified as the issues requiring assessment.

[52] Three of the four witnesses for the Ministry were Ministry officers, two of whom have already been referred to:

- (a) Mr Levy, the Senior Procurement Advisor in the Office of the Deputy General, Sector Capability and Implementation Business Unit (SCI) at the Ministry. As noted above, he was the Senior Contract Manager in the Gambling Harm Minimisation Team during the panel process.
- (b) Mr Bartling, the Group Manager of Mental Health Service Improvement, Sector Capability and Implementation at the Ministry. As noted above, he held delegated authority to make the final decision in the RFP process.
- (c) Mr Derek Thompson. Mr Thompson was Team Leader of the Gambling Harm Minimisation Team.

[53] For the Ministry there was also an affidavit from Mr Andrew Wotton, the partner at PwC who runs the Risk Assessment Team responsible for probity work. Mr Wotton's evidence was not relevant to any matter of consequence. In particular, he did not provide any direct evidence on the substance of the conclusions in the PwC report. Rather, in a very short affidavit, he responded first to a single statement of Mr Mullins – that PwC had inspected PDF files rather than the raw data. Mr Wotton said that this was factually inaccurate because PwC “relied on the actual spreadsheets and other documents in their native formats”. Mr Wotton also rejected an opinion of Dr Jury that there was more discussion between PwC and officers of the Ministry, as to the content and wording of the probity report, than would ordinarily be expected and that this called into question the independence of the audit. Mr Wotton rejected Dr Jury's opinion. I accept what Mr Wotton said on this point, but what Dr Jury said did not have any bearing on my assessment of the PwC report in respect of the matters I have to determine.

## Issue 1: The scope of judicial review

[54] The Ministry, relying on the Court of Appeal's decision in *Lab Tests*,<sup>6</sup> submitted that the decision is not reviewable on any of the grounds advanced by the Foundation apart from the allegations of apparent bias or conflicts of interest.

[55] The Foundation submitted that the Court of Appeal's decision in *Lab Tests* is distinguishable because the context of the present decision is materially different from the context in which the decision in *Lab Tests* was made.

### *Lab Tests*

[56] *Lab Tests* concerned a request for proposals by three District Health Boards for the provision of community laboratory services. There were proposals from two companies, Diagnostic Medlab, the incumbent sole provider, and Lab Tests. Lab Tests won the contract and Diagnostic Medlab challenged the process on an application for judicial review. Diagnostic Medlab succeeded in the High Court.<sup>7</sup> Asher J held that there had been errors in the decision making process arising from two matters: a conflict of interest, and unfairness in respect of access to confidential information. The Judge said that the District Health Boards had a public law duty "to conduct public affairs with probity".<sup>8</sup> He concluded that determining whether there were conflicts of interest, or misuse of inside information, justifying relief, was not confined to consideration of compliance with relevant statutory procedures in that regard, but extended to assessment of compliance with public law obligations.

[57] Lab Tests succeeded on an appeal to the Court of Appeal. The Court of Appeal applied decisions of the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*<sup>9</sup> and *Pratt Contractors Ltd v Transit New Zealand*.<sup>10</sup> The Court said that neither of those decisions supported the broad-based "probity in public decision-making approach".<sup>11</sup> The Court held that, on application

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<sup>6</sup> *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2.

<sup>7</sup> *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832 (HC).

<sup>8</sup> At [160].

<sup>9</sup> *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

<sup>10</sup> *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [2005] 2 NZLR 433 (PC).

<sup>11</sup> *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2, at [85].

of statutory provisions concerning conflicts of interest and use of confidential information to the facts, there were no breaches.

[58] The principal judgment was that of Arnold and Ellen France JJ, delivered by Arnold J. There was a concurring judgment of Hammond J. Arnold J, following references to leading cases, said there were four relevant points to be derived from the authorities:

[56] First, where a public body is involved in a commercial process, in this case seeking tenders and awarding a contract, that body must exercise its contracting power in accordance with its empowering statute, if there is one. Here the ARDHBs must (at least) comply with the requirements of s 25. If they do not, their contracting decision is susceptible to judicial review on the ground of illegality. None of the parties before us disputed this.

[57] Second, the *procedural obligations* of a body performing a public function *will vary with context*. So, a public body exercising a particular statutory power may be bound by natural justice obligations, but such obligations may have less, or even no, relevance to the same body when making another type of decision under statute.

[58] Third, “context” for these purposes includes the nature of the decision being made, the nature of the body making the decision and the statutory setting within which the decision is made. In the present case, the statutory provisions dealing with confidential information and conflict of interest assume critical importance.

[59] Fourth, the Privy Council's decision in *Mercury Energy* indicates that the courts will intervene by way of judicial review in relation to contracting decisions made by public bodies in a commercial context in limited circumstances, *although that is subject to the point about context just made*. Generally other accountability mechanisms (such as ministerial control and parliamentary oversight) are likely to be seen as more appropriate. ...

(emphasis added)

[59] In my judgment, the words given emphasis are pivotal. I will come back to this point shortly. In respect of the first part of the statement, referring to a limit on the scope of judicial review, Arnold J added, later in the judgment:<sup>12</sup>

Clearly, judicial review will be available where there is fraud, corruption or bad faith. Further, we accept, as a matter of principle, that it may be available in analogous situations, such as where an insider with significant inside information and a conflict of interest has used that information to further his or her interests and to disadvantage his or her rivals in a tender. In

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<sup>12</sup> At [91].

such a case, it may be that the integrity of the contracting process has been undermined in the same way as in the case of corruption, fraud or bad faith.

[60] The statement of the Privy Council in *Mercury Energy* was as follows:<sup>13</sup>

It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.

[61] That broad and largely unqualified statement was qualified by the Court of Appeal in two respects. First, its terms have been expanded to “analogous situations”. Second, the Court stated as a matter of principle that whether the scope of review is limited to fraud, corruption, bad faith and analogous situations depends on the context.

[62] In my respectful opinion the Court’s emphasis on context was necessary for two reasons. First, if there could never be judicial review of contracting decisions made in a commercial context, that would be likely to exclude review in situations where well established principles would otherwise require it. Second, the reference to “contracting decisions” and “commercial context” could be difficult to apply without further definition.

[63] Further, in my judgment the Court, in its reference to *Mercury Energy*, was not stating what might be described as a prima facie rule “subject to context”. The starting point is context. With context as the starting point, it may be that certain types of decision are so plainly founded on existing contractual arrangements that there is no scope for the application of broader public law procedural standards. This is illustrated by the Privy Council’s decision in *Pratt Contractors*, where there were no public law causes of action, as well as the *Mercury Energy* decision, which involved both contractual and public law causes of action.

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<sup>13</sup> *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 9, at 391.

[64] Counsel referred to a number of cases which discuss the *Lab Tests* decision.<sup>14</sup> It is unnecessary to discuss these cases except to the extent noted in the next section.

***Application of Lab Tests: the scope of review: matters of context***

[65] The discussion which follows takes account of submissions for the Foundation and the Ministry which were directed to a number of matters of context. The discussion is under subheadings identifying matters of context on which submissions were made and some others I consider relevant. It is to be noted that in *Lab Tests* the Court did not confine context to the three matters recorded at [58], and subsequent cases have addressed other matters of context. Although there are the separate headings, a number of these matters of context overlap.

***The statutory setting***

[66] The statutory setting was at the forefront of Ms Chen’s submissions. The only legislation that is relevant is the provisions of the Act directed to problem gambling. These are contained principally in Subpart 4 of Part 4 of the Act. The heading to Subpart 4 is “Problem gambling levy” but the provisions go much further than the heading indicates.

[67] One of the purposes of the Act, stated in s 3, is to prevent and minimise the harm caused by gambling, including problem gambling. Harm is defined in s 4 as follows:

**harm —**

- (a) means harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling; and
- (b) includes personal, social, or economic harm suffered—

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<sup>14</sup> *Jones v Waitakere City* HC Auckland CIV-2010-404-2338, 29 October 2010; *Te Tai Tokerau Mapo Trust v Chief Executive of Ministry of Health* HC Whangarei CIV-2010-488-307, 5 August 2011; *Te Whanau o Waipareira Trust v Attorney-General* [2012] NZHC 3107; *Healthcare of New Zealand Ltd v Capital and Coast DHB* [2012] NZHC 3417; *Telco Technology Services Ltd v Ministry of Education* [2014] NZHC 213; *Mary Moodie Family Trust v Attorney-General* [2015] NZHC 365, [2015] NZAR 379. Those cases, other than *Jones* and *Healthcare*, are noted in a recent and interesting paper by Professor Janet McLean discussing the test as formulated in *Lab Tests*, entitled *Possibilities for convergence between public and private law*, a paper delivered to the New Zealand Higher Courts’ Judges’ conference on 20 March 2015.

- (i) by the person; or
- (ii) the person's spouse, civil union partner, de facto partner, family, whānau, or wider community; or
- (iii) in the workplace; or
- (iv) by society at large

[68] Problem gambling is not defined, but a problem gambler is defined as “a person whose gambling causes harm or may cause harm”.

[69] The most relevant provisions of Subpart 4 are ss 317 and 318. Section 317(1) provides that the Government may allocate responsibility for an integrated problem gambling strategy to a department which need not be the department responsible for the Act as a whole. As earlier noted, since 2004 the Ministry has had responsibility for an integrated problem gambling strategy. Also as earlier noted, s 317(2) provides, so far as relevant in this proceeding, that an integrated problem gambling strategy must make provision for two matters: measures to promote public health by preventing and minimising the harm from gambling (public health services); and services to treat and assist problem gamblers and their families and whānau (clinical services).

[70] The Foundation, in its evidence and submissions, placed emphasis on the distinction between public health services and clinical services. The nature of the distinction, and the broad scope of public health services, is borne out and made clear in some of the expert evidence for the Foundation. The broad scope of public health services, in itself, at least in terms of the relevant statutory background, is a point of distinction between the statutory setting in this case and that in numbers of other cases, including *Lab Tests*.

[71] Section 318 contains provision for development of the integrated problem gambling strategy, including estimates of costs for a levy imposed under the Act on the gambling industry to recover the cost of implementation of the strategy. Section 318(1) and (2) are as follows:

- (1) The department that has responsibility for implementing the problem gambling strategy must do the following things in developing the strategy:



- (a) undertake a needs assessment; and
  - (b) prepare a strategy in draft; and
  - (c) develop costings for the draft strategy; and
  - (d) in the case of the initial levy period, estimate the costs of the department that has responsibility for the integrated problem gambling strategy during the transition to the strategy in the period before the introduction of the initial levy; and
  - (e) take into account any under-recovery or over-recovery of levy (gambling sector by gambling sector) in previous levy periods; and
  - (f) estimate annual funding requirements for the strategy for a 3-year period; and
  - (g) estimate, using the formula set out in section 320, levy rates for each gambling sector liable to pay the levy; and
  - (h) consult on the matters outlined in paragraphs (a) to (g) with—
    - (i) at least 1 representative of corporate societies licensed to operate gaming machines in commercial venues; and
    - (ii) at least 1 representative of corporate societies licensed to operate gaming machines in non-commercial venues; and
    - (iii) at least 1 representative of casino licence holders; and
    - (iv) the New Zealand Racing Board; and
    - (v) the New Zealand Lotteries Commission; and
    - (vi) representatives of the providers of problem gambling services; and
    - (vii) any other groups it believes are likely to be affected significantly by the proposed strategy.
- (2) The department responsible for the integrated problem gambling strategy must then submit the proposed strategy and the proposed levy rates to the Gambling Commission and the responsible Ministers.

[72] The remaining provisions in s 318 are concerned with steps to be taken by the Gambling Commission in order to make recommendations to the responsible Ministers on the strategy and the levy. The Gambling Commission is required to convene a meeting. At least one representative of providers of problem gambling services, as well as Ministry representatives, and representatives of gambling operators, must be requested to attend the meeting. Section 319(2) provides that the

purpose of the levy is to recover the cost of developing, managing and delivering the strategy.

[73] Ms Chen submitted that the Ministry's decision was made in the context of a "prescriptive statutory legislative framework", and that the Ministry is statutorily required to select providers of problem gambling services. She further submitted that the proper application of funds recovered from the problem gambling levy is a matter over which judicial scrutiny has been applied, so that judicial review of a broad nature is available in this case. She referred to *Clubs New Zealand Inc v Minister of Internal Affairs*.<sup>15</sup>

[74] I do not agree that the RFP process through to the decision under review involved the exercise of a statutory power of decision, at least in a strict sense, but that is not determinative.<sup>16</sup> I also agree with Mr Andrews' submission for the Ministry that the decision in *Clubs New Zealand Inc* is not on point.

[75] The provisions of the Act I have referred to are nevertheless relevant in two respects. The first is that, although the Act does not prescribe the way in which the Ministry, as the responsible department, should implement the strategy, the nature of what it is required to implement is important. This point is of direct relevance to another matter of context – the nature of the decision. This is discussed below, but it is convenient to record my conclusion at this point, as it flows from the statutory setting. What the Ministry is required to do is give effect to the entire legislative directive that there be a problem gambling strategy, which is concerned with all health aspects of problem gambling; the public health aspects as well as the clinical aspects. The Ministry was implementing a national strategy concerned with all health aspects – prevention through to treatment – of problem gambling. And, as the strategic plan indicated, there was need for the public health aspects of problem gambling to be aligned with other areas of public health. These matters moved the case a considerable distance from the type of service in issue in *Lab Tests* and some – perhaps all – of the other cases.

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<sup>15</sup> *Clubs New Zealand Inc v Minister of Internal Affairs* [2014] NZHC 679.

<sup>16</sup> See *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 12.

[76] The second reason why the statutory provisions are relevant arises from the absence of prescriptive provisions as to how the strategy is to be implemented. This is an important point of distinction between the present statutory setting and that with which the courts were concerned in *Lab Tests*. This point was addressed by Collins J in *Telco Technology Services Ltd v Ministry of Education*.<sup>17</sup> That was a decision on an application for an interim injunction and the Court was therefore not required to make a final decision, but to determine, amongst other things, whether there was a serious question to be tried in relation to the substantive application for judicial review. The case concerned an RFP issued by the Ministry of Education for delivery of information, communications and technology services to schools. The Ministry of Education, citing *Lab Tests*, argued that there was not a serious question to be tried on the application for judicial review. On the question of the statutory context the Judge said:

[37] In the present case, there is no obvious statutory framework which regulated the way the Ministry was to conduct the tender process. The legislative provisions cited in submissions were s 4 of the Public Finance Act 1984, s 34 of the State Sector Act 1988 and the Education Act 1989. However, those legislative provisions are of a general nature and did not specifically govern the process followed by the Ministry in this case. Accordingly, the vacuum created by an absence of specific legislative provisions may be filled by public law principles such as natural justice and procedural fairness.

[77] As with the *Telco Technology* case, there is a contrast between the absence in this case of statutory provisions requiring the Ministry to act in various ways which might be described as commercial, and the provisions that applied in *Lab Tests* as to the commercial way in which District Health Boards were required to operate.<sup>18</sup> The contrast is more marked if the comparison is with the statutory provision in the *Mercury Energy* case. The statutory commercial imperative in s 4 of the State-Owned Enterprises Act 1986 required the electricity corporation “to operate as a successful business and ... to be ... as profitable and efficient as comparable businesses that are not owned by the Crown.” There are provisions in s 318 of the Act requiring the Ministry to “develop costings” for the strategy and to “estimate annual funding requirements” for the strategy. The Ministry in undertaking these

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<sup>17</sup> *Telco Technology Services Ltd v Ministry of Education*, above n 14.

<sup>18</sup> *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2, at [68]-[73], and in particular at [72]-[73].

tasks would be subject to the same general statutory constraints to which all government departments, and the Crown generally, are subject, but there is no directive to act commercially. In addition, the purpose of the costings in the annual funding estimates, in a direct sense, is to assess the levy to be imposed on each gambling sector.

[78] In my judgment, an absence of legislative provisions bearing directly on the process leading to the decision in question is a point which supports the Foundation's contentions on the scope of judicial review. This is reinforced by the fact that there are no statutory directives for the decision in question to be determined on a commercial basis.

#### *The Mandatory Rules for Procurement by Departments*

[79] The RFP process was subject to what I have referred to as "the mandatory rules" – the Mandatory Rules for Procurement by Departments. These were rules endorsed by the Cabinet in April 2006. The introduction to the mandatory rules records that they "set out mandatory standards and procedural requirements for the conduct of procurement by government departments" and that they "reflect and reinforce New Zealand's established policy of openness and transparency in government procurement". As the name makes clear, the rules are mandatory. There are some exclusions and exceptions but these have no application.

[80] Provisions of more direct relevance to this case are recorded or noted in the following paragraphs.

[81] Rule 4 is headed "Continuing policy and good practice framework". It provides that "the Government continues to expect its departments to conduct all their procurement within the framework of the policy principles" set out in a policy guide. A footnote states that this includes "the principles of: best value for money over whole of life; open and effective competition; and full and fair opportunity for domestic suppliers".

[82] Rule 14 is headed "Integrity in Procurement Practices". It provides:

Departments must have in place policies and procedures to eliminate any potential conflict of interest on the part of those engaged in or having influence over a procurement.

[83] Rule 28 is concerned with “Tender documentation”, which means tender documents issued by departments. The rule provides:

The tender documentation must contain all information necessary for suppliers to prepare and submit responsive tenders, including the essential requirements and evaluation criteria for the award of the procurement contract.

[84] Rule 28 is reinforced by rule 31, headed “Modifications”. It provides:

Where a department, during the course of a procurement, modifies the essential requirements and evaluation criteria of the tender documentation, it must publish such modification on GETS [a website] or transmit them in writing to all suppliers who have requested tender documentation at the time the criteria are modified, in the same manner the original information was transmitted, and in adequate time to allow such suppliers to modify and resubmit their tenders, as appropriate.

[85] The following rules are under a heading “Awarding of Contracts”:

43. Departments must receive, open and evaluate all tenders under procedures that guarantee the fairness and impartiality of the procurement process.

...

45. Unless the department determines that it is not in the public interest to award a contract, it must award the contract to the supplier that has been determined to be fully capable of undertaking the contract and whose tender is determined to offer the best value for money in terms of the essential requirements and evaluation criteria set forth in the tender documentation.

[86] The Foundation submitted that it is entitled to pursue an application for judicial review on the grounds that the Ministry failed to comply with some of the mandatory rules. It referred to statements of principle in *Chiu v Minister of Immigration*,<sup>19</sup> and to the application of the principles in *G v Psychologists Board*.<sup>20</sup> The mandatory rules provide context of some significance in support of a broad scope for judicial review. This is explained more fully when considering the application of the rules as part of issue 2.

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<sup>19</sup> *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 550.

<sup>20</sup> *G v Psychologists Board* HC Wellington CIV-2007-485-2558, 8 December 2009.

*The nature of the decision*

[87] The Ministry submitted that “the case law clearly indicates that RFP processes and the resulting decisions are inherently, though not necessarily exclusively, commercial or contractual in nature”. What seems to be implicit in that submission is a proposition that, if the decision arises from an RFP, that will largely be an end to the enquiry and the *Lab Tests* limited scope for review will apply. *Lab Tests* involved an RFP, but I do not consider that the scope of review is to be determined on the basis that this case also involves an RFP. The *Telco Technology* case involved an RFP. The commercial element was discussed by the Judge as follows:<sup>21</sup>

[38] In addition, the present case does not simply involve commercial principles. It is reasonably arguable that the Ministry breached its fundamental procedural obligations when it failed to give Telco the opportunity to be assessed on a fair and equal basis with the successful tenderer. Further, it is also reasonably arguable Telco believed that the Ministry would assess all tenderers on a fair basis and relied on the Ministry's representations to its detriment. This is a public law concept that prevails over the commercial nature of this case. Any breach of procedural obligations by the Ministry may well have produced an unfair assessment of all tenderers in the present case.

[88] The Ministry further submitted that contracting for provision of health services is not *necessarily* a public function. And it submitted that the decision only indirectly affects the public; the parties directly affected are the tenderers. In my judgment these points do not assist the enquiry in any substantial way. The first point is too abstract to be of much assistance. In any event, in my judgment the Ministry was plainly performing a public function, as already discussed in respect of the statutory context. The second point might have some relevance if the only parties affected were the proposers, although again it would not take the enquiry very far. But the reality is that a section of the public is affected. Contracting for the provision of these health services was the means by which the Ministry chose to give effect to its statutory obligations under the Act, and with the fundamental objective – the overall goal – being that set out in the introduction to the six year strategic plan, as follows:

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<sup>21</sup> *Telco Technology Services Ltd v Ministry of Education*, above n 14.

The Ministry of Health's approach has not significantly changed from its first strategic plan for preventing and minimising gambling harm. Momentum has gathered in several areas, with the Ministry remaining committed to a long-term approach.

The overall goal of the strategic plan is:

Government, gambling industry, communities and families/whānau working together to prevent the harm caused by problem gambling and to reduce health inequalities associated with problem gambling.

[89] To the extent that other cases may assist, at least by providing points of comparison, the nature of the decision in this case, including its effect on the public, is materially different from numbers of other cases cited, including *Lab Tests*. Other cases involve tenders or proposals for specific services as a small part of a much broader area of public activity. As discussed when considering the legislative context, the present case is concerned with processes leading to a decision for implementation of the entire problem gambling strategy – the fundamental statutory objective underpinning this part of the Act which deals with all health aspects of problem gambling.

[90] Ms Chen gave emphasis to the fact that the decision in this case concerns public health as well as clinical services. That emphasis was justified. The scope of the public health aspect was explained in detail in some of the expert evidence for the Foundation; and in particular in the unchallenged expert evidence of Dr Adams. It is undoubtedly correct, as the Ministry submitted, that the parties directly affected are the proposers, successful and unsuccessful. But these points should not obscure the relevant point of context – the Ministry was making a decision bearing on all aspects of public health and clinical services for problem gambling.

#### *Nature of the body making the decision*

[91] The Foundation submitted that the fact that the Ministry is a core government department, and is not subject to the same express statutory duties to act commercially as, for example, District Health Boards, supported the Foundation's submission for broader judicial review. The Ministry accepted the propositions of fact, but submitted that the Ministry is still required to act commercially.

[92] The fact that the decision maker in this case is a core government department, viewed as a factor in isolation, does not tend to advance the argument to any great extent one way or the other. However, when it is combined with other matters of context, including the absence of express statutory constraints of the sort considered in *Lab Tests*, this does provide further support for the Foundation's primary argument as to the broader scope of judicial review.

*Any relevant contractual provisions*

[93] The presence or absence of any contractual provisions bearing on the decision would seem to be an obvious matter of context, given the significance of the contractual context in cases such as *Mercury Energy*, quite apart from cases such as *Pratt* where the only causes of action were claims in contract.

[94] The RFP in this case did not give rise to any contractual rights or obligations. This does not provide grounds for distinguishing *Lab Tests* because the request for proposals in that case was of a similar non-contractual nature. But the absence of any contractual rights for proposers and corresponding contractual obligations on the Ministry, is another contextual matter, when weighed with others, which lends support for a conclusion in favour of broad judicial review.

*Would "onerous procedural obligations" unduly fetter the power of the public body to negotiate freely?*

[95] This question, bearing on context, arises from observations in *Lab Tests*. Arnold J said:

[78] ... The existence of the power to negotiate is relevant for another reason as well. The imposition of onerous procedural obligations may unduly fetter the DHBs' power to negotiate effectively, thus handicapping them in attempting to deal with determined private sector service providers, as Mr Curry and Mr Illingworth [counsel for Lab Tests and the District Health Boards] argued.

[96] Arnold and Ellen France JJ regarded the point as one of significance. Arnold J came back to it as follows:



[88] But assuming compliance with any [statutory] obligations, we consider that there is limited scope for the imposition of further public law obligations of procedural fairness in this context. Obviously, the imposition of such obligations may significantly limit a DHB's ability to participate fully, in the interests of its resident population, in commercial negotiations with determined private sector enterprises. In our view, this consequence must be taken into account in assessing the extent of the public law procedural obligations to which an entity will be subject. ...

[97] The discussion in *Lab Tests* in which that second statement was made contains the first, and perhaps principal, reason for the Court's conclusion that the scope of judicial review to be applied in that case was not as broad as stated by Asher J in the High Court. The second reason was the availability of accountability mechanisms other than judicial review, discussed below.

[98] In my judgment this provides an important point of distinction between *Lab Tests* and the present case. The process in *Lab Tests* was materially different from the process in this case. In *Lab Tests*, after the proposals were made, each party had discussions with the evaluation panel and each party then had an opportunity to refine or amend its proposal, which each took. The panel also went overseas to inspect facilities of the parent company of the ultimately successful tenderer.<sup>22</sup>

[99] There was no evidence in this case which would support a conclusion that the imposition of procedural obligations of the sort contained in the arguments for the Foundation would impede the Ministry's ability to make a decision on the RFP in the way the Court was referring to in *Lab Tests*. The steps leading to the decision, and the decision itself, did not as a matter of fact involve any negotiation with any of the organisations making proposals. What is more, the RFP did not, at least in any express way, put any obligation on the Ministry to consult tenderers during the decision making process, although it had the ability to do so if it chose to. This is to be compared with the express obligation on the Ministry, contained in mandatory rule 28, to notify any modifications of essential requirements and evaluation criteria in the RFP.

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<sup>22</sup> *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2, at [6] and [340].

[100] One argument for the Foundation was that the Ministry breached an obligation to the Foundation by failing to seek further information from the Foundation. Even if that argument is correct (it is discussed later), what was contemplated by the Foundation's argument was not commercial negotiations, but the provision of additional information. In relation to the process at issue in this case, the only point at which commercial negotiations may have arisen was when the Ministry had made its decision, and entered into negotiations with the successful proposer on the detailed terms of a contract. The RFP did not stipulate fixed contractual terms, but an indicative contract only.

[101] There is also no evidence supporting a finding similar to what is implicit in a submission referred to and accepted by the Court of Appeal in *Lab Tests* at [78]: that the Ministry, in respect of the matters raised by the Foundation, might be handicapped by having to deal "with determined private sector service providers". The *Lab Tests* judgment indicates that the private sector protagonists were limited liability companies driven by the usual obligations of such companies to maximise profit for shareholders. In this case, to the extent that there is evidence, the matters driving the proposers cannot reasonably be categorised in this way, although it may be assumed none of them wanted to waste money. As noted in the introduction to this judgment, the Foundation is a charitable foundation and a not-for-profit organisation. Other tenderers, such as the Salvation Army, would also appear to be organisations which cannot readily be put into the same category as profit driven corporations with obligations to shareholders.

*The complexity of the subject matter*

[102] The complexity of the subject matter raised by an applicant's complaint may provide grounds for declining an application for review, or at least limiting the scope of review. This was touched on in *Lab Tests* when the Court addressed submissions for the respondent seeking to support the High Court result on two grounds rejected by Asher J. One of those grounds was unreasonableness/irrationality. In rejecting the submissions the Court of Appeal said:

[340] As the Judge said, the decision was made by an evaluation panel comprising well-experienced people from both inside and outside the ARDHBs. In addition, they had well qualified advisors available to assist.

The panel went through a lengthy process, and visited Gribbles' facilities overseas in the course of their evaluation. Like the Judge, we do not think that a court is well placed to assess on a judicial review application the medical, economic and other complexities raised by an evaluation process such as that undertaken in the present case.

[103] The Ministry submitted that the decision in this case was complex; that it involved experts analysing complex proposals and using experience and judgement to evaluate them; and that it was not a task that could be undertaken by lay persons.

[104] I accept the Ministry's submission to the extent that there might be particular complaints by the Foundation which require the Court to decide whether the panel, or the Ministry in its formal decision, reached an appropriate conclusion. However, the Foundation's grounds for review under issues 2 and 4, in the way I have expressed them, do not raise issues going to substantive merit. Issue 3 involves an enquiry into, amongst other things, questions as to whether various decisions of the panel, reached in the course of the panel's overall decision making process, were logical or reliable or soundly based. But the nature of the Foundation's arguments in this regard do not require a decision whether particular conclusions by the panel, at various stages, were the correct decisions. In respect of this issue I am again not required to consider substantive merit. The nature of the matters of consequence that I have determined require assessment for issues 2, 3 and 4 are matters relating to process and are of a nature which judges are regularly required to assess.

[105] In respect of the issues requiring determination in this case, further observations in the *Telco Technology* case are apposite:<sup>23</sup>

[39] *Medlabs* can also be distinguished on another basis. The Court of Appeal found that the complexity of the issues in that case were more analogous to those in private law disputes and therefore beyond the bounds of judicial review. In the present case, however, the dispute is not particularly complex. The principal issue is whether the Ministry failed to abide by the procedure it set out for itself in its RFP when selecting a provider for the final phase of the project. Telco is invoking public law to hold the Ministry accountable for what it said it would do but which, according to Telco, it failed to do thereby causing the Ministry to reach a decision that was fundamentally unfair to Telco.

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<sup>23</sup> *Telco Technology Services Ltd v Ministry of Education*, above n 14 (footnotes omitted).

*What is alleged to have gone wrong?*

[106] Consideration of what is alleged to have gone wrong was a contextual matter noted by Arnold J in *Lab Tests* at [85]:

In assessing the standard of review (or scope of the procedural obligations) to be applied, it is necessary to look at the nature of the public body, the particular function being performed, the context within which that function is being performed and what it has said has gone wrong.

[107] In broad measure this involves an enquiry similar to that just referred to – whether the complexity of the subject matter is one suited for adjudication by a Court or not. The observations in the preceding section also apply in respect of this matter.

*The availability of “non-judicial accountability mechanisms”*

[108] In *Lab Tests* the Court of Appeal considered that the existence of accountability mechanisms in the applicable legislation was an important consideration in rejecting the broad scope of judicial review applied in the High Court.<sup>24</sup> This aspect was the subject of an expanded discussion, with reference to the relevant statutory provisions, and in the final evaluation.<sup>25</sup>

[109] The Ministry, in its written submissions, referred to the availability of a complaint to the Ombudsman regarding the Ministry’s conduct and, as an alternative, an inquiry by the Auditor-General under s 18 of the Public Audit Act 2001. Mr Andrews, in his oral submissions, advised that the Ministry did not seek to put too much weight on these mechanisms. It was a responsible acknowledgement. I do not consider that either of these forms of complaint support a conclusion that the scope of judicial review should be narrowed. In my judgment, the absence of other effective accountability mechanisms is in fact another matter supporting the broader of review sought by the Foundation.

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<sup>24</sup> *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2, at [59].  
<sup>25</sup> At [80]-[84] and [89].

### ***Conclusion as to the scope of review***

[110] I am satisfied that all relevant matters of context lead firmly to a conclusion that the decision may be reviewed on all grounds advanced by the Foundation.

### **Issue 2: Adherence to the RFP: the mandatory rules: legitimate expectation**

#### ***Introduction***

[111] The broad thrust of the Foundation's allegations of fact under this heading were that the Ministry did not follow evaluation processes set out in, or indicated by, the RFP, and did use processes, or approaches, which were not notified in advance. The allegations can be considered under four headings:

- (a) Issue 2(a): In evaluating proposals the Ministry used criteria, and weightings of criteria, which differed from those recorded in, or indicated by, the RFP.
- (b) Issue 2(b): The moderation process was not part of the process set out in, or indicated by, the RFP, and was inconsistent with the processes that were set out in, or indicated by, the RFP.
- (c) Issue 2(c): The Ministry should have sought further information from the Foundation about its lead agency proposal.
- (d) Issue 2(d): Other complaints of breach of a legitimate expectation.

[112] The Foundation contended that these matters gave rise to claims founded on breach of some of the mandatory rules and breach of the Foundation's legitimate procedural expectations. I will outline the general legal principles before considering the issues.

#### ***The mandatory rules***

[113] The nature of the rules, and those of more direct relevance, have been outlined. The most relevant rules in respect of issue 2, concerned with adherence to

the RFP, are mandatory rules 28, 31 and 45. I will restate the essential requirements by reference to the RFP in this case:

- (a) Rule 28 directed the Ministry to put into the RFP *all* information necessary for proposers to prepare and submit their proposals. The rule referred specifically to two matters to be included in the RFP – the essential requirements and evaluation criteria for evaluation of the proposals. This mandatory rule refers to requirements and evaluation criteria “for the award of the procurement contract” but it clearly applies to requests for proposals.
- (b) Rule 31 required that any modification of the essential requirements and evaluation criteria in the RFP had to be published on the GETS website, or advised to proposers in writing.
- (c) Rule 45 gave emphasis to the significance of the recording in the RFP of “the essential requirements and evaluation criteria”.

[114] Ms Chen relied on the following statement of the Court of Appeal in *Chiu v Minister of Immigration* concerning misinterpretation of voluntarily adopted rules:<sup>26</sup>

The administrative law significance of misinterpreting voluntarily adopted rules or guidelines depends upon the context in which the misinterpretation occurs: see further Baldwin and Houghton, “Circular Arguments: The Status and Legitimacy of Administrative Rules” [1986] Public Law 239 and *de Smith’s Judicial Review of Administrative Action* (4th ed, 1980) pp 317 and 507. In the majority of cases the misinterpretation will vitiate the decision upon the ground that it constitutes an error of law (*R v Chief Immigration Officer, Gatwick Airport, ex parte Kharrazi* [1980] 1 WLR 1396 (CA); *Fitchett (Contractors) Ltd v Secretary of State for the Environment* (1988) 56 P & CR 380; *Re Preston* [1985] AC 835 at 866 explaining *HTV Ltd v Price Commission* [1976] ICR 170), produces unreasonableness in the administrative law sense (*R v Secretary of State for the Home Department, ex parte Khan* [1985] 1 All ER 40, 52 (CA)), frustrates a legitimate expectation (*ibid*), or causes a delegate to stray beyond the authorised scope of his delegation (discussed, although held not applicable on the facts, in *Broadbridge v Stammers* (1987) 76 ALR 339, 343). The present case is not the occasion for extended analysis of the law on this topic. It is sufficient to say that although the result could probably be justified under more than one heading in this case, we would see unreasonableness as a sufficient ground for vitiating the officer’s decision even if it had turned upon

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<sup>26</sup> *Chiu v Minister of Immigration*, above n 19, at 550.

misinterpretation of the manual. Whatever decision might have been proper if based upon other sources, we do not consider that any reasonable decision maker attempting to apply para 14(e) of these guidelines could have arrived at the result reached by the officer.

[115] The present case is concerned with alleged breach of rules. *Chiu* was concerned with an allegation of misinterpretation of rules, rather than breach, although the two might overlap. *Chiu* was also concerned with a substantive rule, rather than a procedural rule: a rule, voluntarily adopted by the New Zealand Immigration Service, which indicated when applications for permits under the Immigration Act 1987 should be declined. In cases following *Chiu* the principles have been applied to breach of a rule, rather than misinterpretation, and breach of procedural rather than substantive rules.<sup>27</sup> The circumstances in which breach of procedural rules will vitiate a decision are discussed in the cases.<sup>28</sup>

[116] I am satisfied that breach of the mandatory rules, unless the breach is immaterial, will vitiate the decision. *Chiu*, and the other cases noted, were concerned with voluntarily adopted rules or guidelines. That is not the case with the mandatory rules. There were no submissions for either party as to the correct legal categorisation of the mandatory rules, with the possibilities ranging, in broad terms, from something close to delegated legislation to purely voluntary codes. The rules in question in *G v Psychologists Board* illustrate the latter end of the spectrum.<sup>29</sup> That case concerned guidelines which the Psychologists Board had developed for its own use for review of competence and for development of competence programmes. In that case this Court held that the Board did err in failing to follow the rules (although the Court held that the breach was not material). The rules, or guidelines, in the other cases noted – *Chiu* and *Ankers v Attorney-General* – were rules applying to government departments, but nevertheless voluntarily adopted. The mandatory rules are ones imposed on all government departments with the authority of Cabinet. In my judgment they have a degree of legal force substantially greater than voluntarily adopted rules, whether voluntarily adopted by a government department, or by an organisation such as the Psychologists Board.

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<sup>27</sup> *Ankers v Attorney-General* [1995] 2 NZLR 595 (HC); *G v Psychologists Board*, above n 20, at [91]-[97].

<sup>28</sup> There is an extensive discussion in the article cited in *Chiu*: Robert Baldwin and John Houghton “Circular Arguments: The Status and Legitimacy of Administrative Rules” [1986] PL 239.

<sup>29</sup> *G v Psychologists Board*, above n 20.

[117] The following points may be noted:

- (a) The mandatory rules are not guidelines. They are prescriptive.
- (b) Rule 28 refers expressly to “evaluation criteria”. This bears directly on the Foundation’s complaints summarised above as issues 2(a) and 2(b). The Ministry was bound to state all of the essential evaluation criteria. It could not use other evaluation criteria of any consequence unless it complied with rule 31, with this reinforced by rule 45.
- (c) These rules, read in context, also put the onus on the Ministry to ensure that the RFP was clear. One argument for the Ministry was that, if there was ambiguity, or a lack of clarity, in the RFP, any tenderer could ask for clarification. A similar point was made in the PwC probity report.<sup>30</sup> It is correct that a tenderer could seek clarification. And some tenderers did seek clarification on some matters and the Ministry’s response was published on GETS. But those facts do not mean that the Ministry was relieved of its obligation to ensure that there was clarity, including an absence of ambiguity. Otherwise, if there was a lack of clarity which was not recognised by a tenderer, the tenderer’s oversight would relieve the Ministry of a mandatory obligation.
- (d) The nature and extent of the obligation imposed on the Ministry, and the burden arising for those involved in producing the RFP, is indicated in a negative way by the absence of a provision that had been put in a draft of the RFP, but was not the final document. This was a statement recording that the criteria were in no particular order, were not exhaustive, and that the weight of criteria could be changed without notification.

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<sup>30</sup> The fact that PwC made this point is somewhat surprising. This part of the PwC report is discussed below, at [180]-[184].



### *Legitimate expectation*

[118] It has been widely recognised that two types of legitimate expectation can arise.<sup>31</sup> One is a substantive legitimate expectation: an expectation of a particular outcome. The other is a procedural legitimate expectation: an expectation that certain procedural steps will be taken before making a decision.

[119] The Foundation's case rests largely on the latter – claimed legitimate expectations of a procedural nature. The factual allegations in issues 2(a), 2(b) and 2(c) are of this nature. However, there was a pleading that the Foundation had a legitimate expectation that the Ministry would “signal in the RFP any significant changes to the [problem gambling service] sector that it intended to result from this tender process”. This is discussed as part of issue 2(d). It could be characterised as a substantive legitimate expectation to the effect that, in the absence of notification and consultation before the decision was made, there would be no substantial changes to the sector. It is not in issue that the Foundation was the major provider in New Zealand of problem gambling services, so the Foundation's contention as to the outcome may be seen as a substantive legitimate expectation (with an expectation as to the procedural process arising from the need for notification). At least for the purposes of this case, detailed analysis and legal characterisation is unnecessary.

[120] In *Comptroller of Customs v Terminals (NZ) Ltd* the Court of Appeal discussed legitimate expectation as follows:<sup>32</sup>

[123] Establishing a legitimate expectation in administrative law is not dependent on the existence of a legal right to the benefit or relief sought. The expectation might be engendered by promises that a particular authority will act in a certain way or by the adoption of a settled practice or policy which the claimant can reasonably expect to continue.<sup>33</sup> A promise of the kind alleged may be express or implied.<sup>34</sup>

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<sup>31</sup> Graham Taylor *Judicial Review: A New Zealand Perspective* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2014) at [13.82].

<sup>32</sup> *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137. This case concerned a claim of a substantive legitimate expectation, but the Court's observations apply to both types of legitimate expectation.

<sup>33</sup> *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 401 per Lord Fraser.

<sup>34</sup> *Vea v Minister of Immigration* [2002] NZAR 171 (HC).

[124] Legitimate expectation is to be distinguished from a mere hope that a cause of action will be pursued or a particular outcome gained.<sup>35</sup> To amount to a legitimate expectation, it must, in the circumstances (including the nature of the decision-making power and of the affected interest) be reasonable for the affected person to rely on the expectation.<sup>36</sup>

[121] The Court set out a three step test:

[125] Where legitimate expectation is raised, the inquiry generally has three steps. The first is to establish the nature of the commitment made by the public authority whether by a promise or settled practice or policy. This is a question of fact to be determined by reference to all the surrounding circumstances. A promise or practice that is ambiguous in nature is unlikely to be treated as giving rise to a legitimate expectation in administrative law terms.

[126] The second is to determine whether the plaintiff's reliance on the promise or practice in question is legitimate. This involves an inquiry as to whether any such reliance was reasonable in the context in which it was given.

[127] The third, and often most difficult part of the inquiry, is to decide what remedy, if any, should be provided if a legitimate expectation is established.

[122] The Foundation submitted that, as in *Telco Technology Services Ltd v Ministry of Education*, an RFP process can give rise to a legitimate expectation.<sup>37</sup> In that case Collins J held that it was reasonably arguable that the Ministry of Education's conduct created a procedural expectation that it would only appoint one supplier. There was a proviso in the RFP that the Ministry of Education could amend the RFP and consider or reject alternative proposals in its sole discretion. At an elementary level, this indicates that an RFP can in principle create a legitimate expectation. However, each case must be examined on its own facts.

[123] The Ministry accepted the legal principles as articulated for the Foundation, but argued that they did not apply to this case. The Ministry submitted in particular that the expectations were not reasonable, or legitimate, in light of what the Foundation knew, and in any event there was no breach.

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<sup>35</sup> *Haoucher v Minister for Immigration & Ethnic Affairs* [1990] 169 CLR 648 at 682; and *White v New Zealand Stock Exchange* [2000] NZAR 297 (HC) at 314.

<sup>36</sup> *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 (CA).

<sup>37</sup> *Telco Technology Services Ltd v Ministry of Education*, above n 14.

### ***Interpretation of the RFP***

[124] Mr Andrews made submissions on the proper approach to interpretation of the RFP. He relied in particular on a statement by the Privy Council in *Pratt Contractors Ltd v Transit New Zealand*.<sup>38</sup> The Privy Council agreed with the conclusion in the Court of Appeal that a tenderer with rights under a preliminary process contract could not rely on detailed procedures prescribed in manuals that were not part of the tender documents.<sup>39</sup>

[125] In my judgment *Pratt Contractors* has no application to the matters presently being discussed. The present case is not one involving a preliminary procedural contract and the Foundation does not seek to incorporate terms of the mandatory rules into the RFP.

[126] The mandatory rules are nevertheless to be applied for the reasons earlier discussed. They are central to the question whether there has been error by the Ministry in failing to comply with the RFP. They are also of importance, for the reasons earlier outlined, in interpreting the RFP. The onus was on the Ministry to ensure that the RFP was clear in respect of matters of consequence and, in particular, evaluation criteria and their weightings.

[127] I will now consider the issues under the headings outlined in the introduction to this section.

### ***Issue 2(a): Deviation from the RFP: changes to the evaluation criteria and weightings***

[128] The Foundation contended that the panel, in its evaluations, used criteria, and weightings of criteria, which differed from those expressly recorded in two parts of the RFP – a table in paragraph 48 and Part D. Paragraph 48 and Part D, as well as

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<sup>38</sup> *Pratt Contractors Ltd v Transit New Zealand*, above n 10, at [39] and [44]. Mr Andrews, following the hearing, filed a further memorandum referring to two further cases on the question of interpretation of the RFP: *Opuia Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19, [2003] 3 NZLR 740; and *South Waikato District Council v Roading and Asphalt Ltd* [2013] NZCA 566. I have taken account of those further cases in the conclusion I have reached.

<sup>39</sup> *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 (CA) at [81]-[82].

the other provisions of the RFP referred to in this section, are in appendix 1.<sup>40</sup> The Foundation said that there were changes to the criteria in material respects and, had the Foundation known about the changes, different or additional information would have been provided. The Foundation contended further that these changes materially affected the weights of various sub-criteria and, in consequence, the weight given to the relevant main criterion in the final score.

[129] These changes altered weightings from between 2% and 7.5%. The figures are established in unchallenged evidence from Mr Mullins. Changes to this extent for a single sub-criterion had a material effect on the overall score for a proposal. Obviously enough, numbers of such changes therefore increased the effect.

[130] The Ministry's response was, in effect, that Part D was not relevant; that the RFP had to be assessed as an entire document which, the Ministry submitted, was not the way the Foundation approached the matter; and that all of the sub-criteria which the Foundation suggested were added or changed are recorded in Part E of the RFP. The heart of the Ministry's contention was that Part E is determinative; that it sets out all the information required to be provided by proposers for the evaluation.

[131] There was a further submission for the Ministry that, to the extent that there may have been some lack of clarity in the RFP, or ambiguity or internal inconsistency, it was incumbent on proposers to seek clarification. For the reasons earlier recorded I do not accept that argument.

[132] The arguments for the Foundation, and the Ministry's responses, require detailed consideration of matters relating to each of the eight criteria set out in the paragraph 48 table, the numerous sub-criteria which are recorded in Part D, Part E, and appendix 2 – the document used by the panel. But part of the evaluation may also be done in a broader discussion of the most relevant parts of the RFP in appendix 1, and I turn to this first.

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<sup>40</sup> Where it may assist to locate a provision in appendix 1, I will include the page number of appendix 1 in brackets.

*Appendix 1: the RFP: its most relevant provisions*

[133] An opening sentence in the RFP is pivotal. This is the first sentence of paragraph 4, as follows:

The Ministry will select the preferred Proposal(s) based on its evaluation of the Proposals against the evaluation criteria specified in Part D.

[134] There is no ambiguity in this statement. It expressly tells those wishing to make proposals that the evaluation criteria are those specified in Part D. It says, in other words, that the determinative part of the RFP in relation to criteria is Part D. This means not only the eight main criteria, which are those listed in the paragraph 48 table, and reproduced in abbreviated form in Part D, but also the sub-criteria, listed in Part D, for each of the eight main criteria. In consequence, a sub-criterion recorded for one main criterion could not be used in the evaluation of a different main criterion. Similarly, paragraph 4, when applied to Part D, makes clear that only the sub-criteria recorded for one of the main criteria would be taken into account for that main criterion. And paragraph 4 plainly does not say, contrary to the central submission for the Ministry, that Part E is determinative. Paragraph 4 makes no reference to Part E.

[135] Paragraph 6 (page 2) describes the main parts of the RFP, including brief descriptions of Parts D and E. This does not alter what is conveyed by paragraph 4. In relation to Part E, paragraph 6 simply refers to “information to be provided”. The detailed content of Part E is assessed below, under the criteria headings, but in this general discussion it is to be noted that Part E is headed “FORMAT INFORMATION REQUIRED” (page 7). In other words, the summary of Part E in paragraph 6, and the heading of Part E itself, refer to information in relation to matters beyond the critical evaluation criteria. This conclusion tends to be reinforced by, for example, paragraph 18 (page 3) – “Proposals must follow the format of the response template in Part E of this RFP”.

[136] There may be a degree of ambiguity in relation to Part E, arising from paragraph 38(iii) (page 4) and paragraph 46(ii) (page 5). However, when the statements there are put into the context of the document as a whole, I am not persuaded that the primary obligation on the Ministry, arising under the mandatory

rules, was sufficiently met to effectively shift the onus onto proposers to seek clarification. Paragraph 45 (pages 4-5) indicates that Part E is concerned with formatting and this, and paragraph 46 just referred to, is then followed by the critical paragraph 48 with the table.

[137] Paragraph 48 (page 5) commences in terms which unambiguously tie the paragraph 48 table into Paragraph 4 and Part D:

The criteria and weightings for the quality and commercial aspects of the evaluation are set out below.

There are eight evaluation criteria with weightings for each recorded as a percentage of the whole.<sup>41</sup>

[138] Part D (page 6) is headed: “PROPOSAL EVALUATION CRITERIA”. This is in contrast to the heading to Part E noted above: “FORMAT INFORMATION REQUIRED”. Paragraph 100 in Part D, is as follows:

Potential providers **must** first meet the Minimum Standards set out in paragraph 45. Subject to complying with the Minimum Standards the following criteria will be used when assessing the Proposals received and selecting the preferred provider (if any). ...

(emphasis in the original)

[139] Paragraph 45, referred to in paragraph 100, includes the reference to Part E noted earlier. This gives some emphasis to the conclusion that Part E is concerned with minimum standards, to be assessed by reference to a range of information to be provided for the purpose of determining whether a proposal should go to evaluation at all, and that Part E is not determinative as to the criteria.

[140] Part D then records the eight principal evaluation criteria listed in the paragraph 48 table. Under headings for each criterion, sub-criteria are listed, ranging from one sub-criterion for price to seven for delivery of services. The eight criteria in Part D are the same as those in the paragraph 48 table. I will generally refer to

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<sup>41</sup> The table in the original RFP recorded the price weighting at 100% of the total for all criteria. This was an obvious error, acknowledged in submissions. It should be 30%, corresponding with the percentage recorded in the left hand column for price. This error has been corrected in the reproduction in appendix 1.

these as the “main criteria”, to distinguish them from sub-criteria. The main criteria are listed in Part D in a slightly different order from the paragraph 48 table, and the descriptions of the criteria in Part D are abbreviated.<sup>42</sup> The abbreviation and minor rearrangement is not relevant (other than as an indication, albeit minor, of loose drafting).

[141] Part E in the original RFP is 20 pages long. The first ten pages of Part E are reproduced in appendix 1 (pages 7-16). There are three introductory paragraphs, 101-103 (page 7). These paragraphs make clear that proposers are required to provide the information sought in a series of questions that follow, but these paragraphs do not alter the conclusions already recorded as to the primacy of Part D in respect of criteria and sub-criteria.

[142] There are links between some sections of Part E and the primary criteria listed in the paragraph 48 table. But Part E, unlike Part D when read in conjunction with paragraph 4, is not presented or described as the determinative part of the RFP for criteria and weightings. Aspects of that conclusion in relation to Part E have already been noted. The Ministry nevertheless sought to rely on some of the questions in Part E in its response to the Foundation’s contentions about changed criteria and weightings. I am satisfied that the Ministry is not entitled to do this. My reasons, in addition to those already outlined in this general discussion, now follow.

[143] The following detailed analysis of the Foundation’s contentions and the Ministry’s responses are under eight subheadings related to each of the main criteria. The seven “quality” criteria, described as such in the paragraph 48 table, are dealt with first, and in the order they are listed in the paragraph 48 table, followed by the price criterion. This is the same sequence in which the main criteria are listed in the panel’s document, appendix 2. The subheadings use the abbreviations of the main criteria that appear in appendix 2, followed by the fuller description in the paragraph 48 table, the weightings as a percentage of the total, and the weighting of each of the

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<sup>42</sup> As will be apparent, the price criterion is the last one recorded in Part D, whereas it is the first in the paragraph 48 table. The one change of sequence and abbreviation which may not be immediately obvious is that the first quality criterion from the paragraph 48 table – “Organisational strength and stability requirements” – appears as the sixth item in table D and is abbreviated to “Requirements”.

seven quality criteria as a percentage of all seven quality criteria. The subheadings record the percentages for ease of reference because of the materiality of deviations from the criteria and sub-criteria as recorded in the RFP.<sup>43</sup>

*Requirements: Organisational strength and stability requirements: 12.5% of total: 18% of quality*

[144] The Foundation said that a sub-criterion described as “Financial viability” was added to the requirements criterion without notification. This was given a sub-weighting within the requirements criterion of 25%. This is a significant change because it brought in a sub-criterion which represents 3% of the total evaluation.

[145] It is convenient to pause at this point to use this example briefly to discuss the question of materiality of changes. At first blush 3% may seem a relatively small number. But the materiality of a number, expressed as a percentage or otherwise, depends on what it relates to. Mr Mullins’ evidence demonstrates the materiality of even small numbers, expressed as percentages. But the point may be given emphasis by reference to a single fact in relation to criteria in this case – this is that 3% was the total value of one of the main criteria, abbreviated in Part D and in appendix 2 as “Purchase Units”. The criterion now being considered, and which the Foundation complains was added without notification, is only one of four sub-criteria assessed by the panel for the main requirements criterion, but had the effect just discussed. Small changes will also and obviously be material when the scores for numbers of proposals are close.

[146] The Ministry said that Part E made clear that financial viability was a sub-criterion to be assessed when considering requirements.

[147] I do not agree with the Ministry. A substantial reason for my conclusion is the point already discussed – Part D is determinative. This is a point of general application in respect of all criteria. There are three sub-criteria in Part D and these do not include financial viability. I will discuss in a moment the detail of the Ministry’s submissions based on Part E. But an obvious question arises at this point

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<sup>43</sup> It should also be noted that two weighting percentages recorded in Part E are wrong. “Delivery of Services – 24.5% of Quality” (page 10) should be “21.5% of Quality”. “Potential Provider’s Experience – 7.5% of Quality” (page 10) should be “10% of Quality”.



(and one which is again applicable to the discussion in respect of all criteria): if the listing of sub-criteria in Part D is not determinative, as the Ministry contended, what was the purpose of Part D? On the basis of the Ministry's argument, Part D had no, or very little, purpose. That cannot be correct, even as a general proposition, and plainly it is not when Part D is put in context.

[148] The Ministry said that question 12 in Part E (page 9) justified the Ministry, through the panel, in adding financial viability as a fourth sub-criterion for the main requirements criterion. It appears as one of four sub-criteria in appendix 2, where it is given a sub-weighting of 25%. The right hand column in appendix 2, although not headed as such, has cross-references to questions in Part E, and the cross-reference for financial viability is to question 12. This may have assisted panel members, but it did not assist those making proposals because it was not disclosed as part of the RFP, or otherwise.

[149] Question 12 in Part E states: "Your Proposal should demonstrate the financial stability of your organisation". This might be taken to mean the same as "Financial viability". But there is no reasonable basis upon which a proposer could have been required to conclude that this isolated question in fact amounted to a sub-criterion. Question 12 is one of the first 16 questions. The heading to these questions is "Information about Potential Provider's [sic] (Minimum Standard)" (page 8). The heading has nothing to do with evaluation criteria. There is some connection with the paragraph 48 table because the heading concludes "- 18% of Quality". A person wishing to make a proposal could have calculated that the 18% of quality corresponds to 12.5% of the total, being the weighting for the main requirements criterion in the paragraph 48 table. Beyond that the connection is tenuous.

[150] The panel document, appendix 2, has cross-references for the four sub-criteria to questions 8, 9, 12 and 14 (pages 8-9). An organisation making a proposal might have discerned that questions 8, 9 and 14 have a degree of relationship with the three sub-criteria in Part D, but how was that organisation then to isolate question 12 as a further critical sub-criterion? In any event, the degree of relationship between the questions identified in appendix 2, and the way in which the sub-criteria are defined in Part D, is not consistent. This is most apparent in respect of the

conflicts of interest sub-criterion, a matter in respect of which the Foundation was said to have been deficient in its response. Part D records as one of the three criteria: “Explanation of conflicts of interest or potential conflicts and how they will be managed?” That plainly requires a statement of any existing conflicts or potential conflicts and the Foundation had none. However, the Foundation scored poorly on this sub-criterion apparently because it failed to make clear what its general policy was on conflicts of interest, and this was said to be inconsistent with question 14. I am satisfied that that expanded approach of the panel and, through the panel, the Ministry in the final decision, was not justified. This is a recurring theme with some of the detailed analysis and I will not go into detail under every heading.

[151] The general inapplicability of Part E is also demonstrated, in a negative way, by the Ministry’s own internal assessment document, appendix 2. This recognises that most of the questions 1 to 16 are not directed to essential sub-criteria for requirements. How could an organisation making a proposal have reasonably determined which sub-criteria were critical other than by reference to Part D? The alternative to that would be an argument that all of the questions 1 to 16 represent essential sub-criteria. There was no such argument for the Ministry.

*Delivery: Ability to deliver the required Services: 15% of total: 21.45% of the quality*

[152] The Foundation said that one sub-criterion was added and another removed:

- (a) “Viable organisational structure” was added with a weighting of 15% of the delivery quality criterion, with the added item therefore representing around 2% of the total.
- (b) “Any proposed subcontractors ... experience” was removed as a sub-criterion.

[153] The Ministry said that “viable organisational structure” was encompassed in question 10 of Part E (page 8), which asked for information about the “size of the organisation, including staff numbers [and] annual turnover”.

[154] The Ministry's argument is not sustainable. Question 10 is one of the first 16 questions, already discussed, in the first subsection of Part E. This has nothing to do with the delivery criterion, and which has the other features, already discussed, which are contrary to the Ministry's general argument. Even if the location of question 10 in this first section of Part E is left to one side, the question itself has no obvious connection with a criterion concerned with ability to deliver the required services; certainly none sufficient to indicate to a proposer that this was an essential sub-criterion for the evaluation of the main delivery criterion.

[155] Unlike Part E in respect of the requirements criterion, for the delivery criterion there is a link between Part E and Part D (and the paragraph 48 table). This comes from the heading in Part E to questions 17 to 21 (page 10) – "Delivery of Services" (albeit with an incorrect calculation of the weighting). And questions 17 to 21, under this heading, reflect some of the sub-criteria in Part D. But the link between Part E and Part D is still incomplete because Part D has seven clearly expressed sub-criteria, whereas Part E has four questions which do not come close to capturing all of the sub-criteria listed in Part D for delivery of services. Any uncertainty as to whether that conclusion is correct is removed by the Ministry's internal document, appendix 2. Appendix 2, in the central column, lists all but one of the sub-criteria listed in Part D, although sub-criteria (vii) in Part D has been separated into four sub-criteria in appendix 2. The significance of appendix 2 in the present context is that it records, in the right hand column, that Part E questions bearing on two of the criteria are not in the Part E "Delivery of Services" subsection, questions 17 to 21, but in the preceding subsection containing questions 1 to 16.

[156] The Foundation's other complaint was that the seventh sub-criterion in Part D was removed from the panel's evaluation. That is undoubtedly correct. This also is apparent from appendix 2. This was unexplained. It is contrary to what is clearly stated in paragraph 4 and Part D of the RFP.

*Experience: Successful experience in delivery of similar services: 7% of total: 10% of quality*

[157] The Foundation did not contend that sub-criteria for this main criterion were changed. The two sub-criteria in Part D are reflected in the abbreviated statement of

the two sub-criteria in appendix 2 for experience. Here there is also a fairly direct link between Part E and Part D. Appendix 2 has a cross-reference, for both sub-criteria, to question 22 (page 10) in Part E, which captures the two elements in the single question.

[158] There is apparent consistency for this main criterion compared with other main criteria. But this demonstrates in a different way why I am unable to accept the Ministry's argument about the primacy of Part E. As the experience criterion now being considered illustrates, what the Ministry's argument necessarily entailed, although not acknowledged, was that in some cases there could be direct transfer of specific sub-criteria from Part D into the panel template (appendix 2) for some of the main criteria, but changes were nevertheless permitted for other criteria. I am satisfied that processes of that nature were impermissible.

*Capability: Capability of staff proposed to deliver the required Services: 15% of total: 21.45% of quality*

[159] As with the preceding criterion, there is consistency between Part D, Part E at questions 23-25 (page 11), and the panel document in appendix 2. The point just made in respect of the Ministry's consistency in some instances, but not in others, applies in the same way.

*Alignment: Alignment of Services with the health and social service sector: 10% of total: 14.3% of quality*

[160] The Foundation's complaint was that "Alignment with Strategic Plan" was added as a sub-criterion to this main criterion. The Ministry said that "Alignment with Strategic Plan" is in Part E at question 28 (page 11).

[161] Part D for alignment records two sub-criteria, although they could be separated into more than two as has occurred in the panel document in appendix 2. The Part E subsection corresponding to alignment is under the subheading to questions 26 to 30 (pages 11-12).

[162] The new sub-criterion leading to the Foundation's complaint – "Alignment with Strategic Plan" – is reflected in question 28 of Part E. It refers expressly to

alignment with the strategic plan. This fact, standing alone, is against the Foundation. But the more general considerations already discussed apply in respect of the primacy of Part D over Part E. And when the analysis again gets into the fine detail, the asserted connection between this section of Part E – questions 26 to 30 – and the main alignment criterion begins to disappear. Question 27 (page 11) in Part E (recorded in Part E as a question bearing on alignment) does not appear in the panel's assessment document in appendix 2. As with other arguments for the Ministry founded on Part E there is inconsistency.

[163] The Ministry submitted that the Foundation should have realised that alignment with the strategic plan was an important sub-criterion in respect of the main alignment criterion because other proposals contained relevant information. I am not persuaded by that submission having regard to all of the other matters discussed up to this point, including the onus on the Ministry under the mandatory rules. The addition of this sub-criterion was not permissible having regard to the rules and the clear terms of the RFP.

[164] The error was material. It is again appropriate to digress from the detailed analysis of the documents to use this as another example of materiality. The alignment with strategic plan sub-criterion was given a sub-weighting in the main alignment criterion of 30%. This represented approximately 3% of the total evaluation of all criteria. And it represented approximately 4.3% of the total for the seven main quality criteria. The Foundation's consensus score on this was zero for both its stand alone proposal and its lead agency proposal. Mr Ramsey said that, if the Foundation had been aware of the exact criteria that its proposals would be assessed against, it would have changed its approach to its proposals. He then outlined information that would have been provided. This was not just for the alignment criterion, but it is convenient to refer to the evidence in this regard because of the materiality of what I consider to be the breach by the Ministry. Mr Ramsey said:

[The Foundation] can easily show that it has almost 100 per cent alignment with the Ministry's six year strategic plan ... and would have been able to prove this to the Ministry by explaining how its Proposals met the objectives in the strategic plan. There is nothing in the 11 objectives included in the

strategic plan that [the Foundation] (and Hapai as its partner in the proposed consortium) could not perform well in.

[165] There was more to the same effect. I emphasise, to avoid doubt, that I do not refer to this evidence as part of an assessment of the Ministry's decision on its substantive merits. It is recorded to demonstrate the materiality of error. This particular sub-criterion is used as the example. I am satisfied that the Foundation would have provided the information it said was available. It is not for the Court then to seek to make a determination as to what the result would or might then have been. It is sufficient to record the effect this had on the content of the proposal actually made, and I am satisfied it was significant. The materiality of the error for this criterion was compounded by material errors with other criteria, as already explained and further explained below.

*Outputs and Outcomes: Performance and Quality measures to ensure the quality of Services: 7.5% of total: 10.73% of quality*

[166] The Foundation's complaint in respect of this criterion was different from that in respect of the other criteria. Mr Ramsey said that the Foundation understood that the Ministry was wanting information relating to external outputs, but it became apparent, following discovery, that the panel had been looking for information about an organisation's internal systems. The fact that that is what the panel was directed to consider is made clear from minutes of the panel meetings. On outputs and outcomes the minutes record in respect of the Foundation's proposals:

The panel was specifically looking for signs of audit findings and implementation responses, quality accreditation either completed or in progress, the use of any internal key performance measures and regularity of reporting to assist the improvement of outputs and outcomes.

[167] Mr Ramsey said that, if the Foundation had understood that the Ministry was looking for details of the Foundation's internal systems it would have provided a range of information which, on the face of it, is reasonably impressive. I emphasise again that that observation does not constitute an assessment of substantive merit, but of material consequences if there is error in the process. The concerns expressed by Mr Ramsey were confirmed in this regard (as with other concerns) in the expert evidence of Dr Jury.

[168] The Ministry submitted that Part E indicates that what was required was information on internal systems or processes. It is submitted that this was contained in question 32 in Part E (page 12). Questions 31 and 32 are the two questions in Part E in a subsection headed “Outputs and Outcomes”. Following question 32 there is this statement:

For example, you could describe your internal quality assurance processes.

[169] The Ministry relied on that single sentence as justification for a proposition that it should have been clear to the Foundation that information as recorded in the panel’s minute was the critical information for a good score on outputs and outcomes.

[170] This single sentence cannot govern the interpretation of the RFP. A criterion described as “Outputs and Outcomes”, is not an enquiry about internal processes. The substantive questions 31 and 32 are not directed to internal processes. Matters relating to an organisation’s internal systems or processes would come more obviously under aspects of the requirements criterion – organisational strength and stability requirements – if internal systems were considered significant. And if internal systems were considered significant, sub-criteria in respect of them should have been recorded in Part D because that is where paragraph 4 of the RFP said the criteria would be found. Even on the Ministry’s argument that Part E was determinative, this single sentence, which is not remotely directive, falls a long way short of making clear that a criterion called outputs and outcomes in fact relates to internal systems. The simple and obvious way to make clear in the RFP that there was a criterion as described in the panel minutes was to put it in the RFP. It was not in the RFP.

*Purchase Units: Ability to deliver all clinical and public health services required in a region: 3% of total: 4% of quality*

[171] There are two sub-criteria in Part D. The Foundation complained that one of these was not addressed by the panel when assessing the main purchase units criterion. This is the sub-criterion “ability to deliver both public health and clinical services in preferred regions?”. The other sub-criterion in Part D – “ability to deliver all purchase units across a region?” – is the only one found in the panel document for

purchase units (appendix 2). Because this was the only item, it therefore had a weighting of 100% for this quality criterion.

[172] The inconsistency on the part of the Ministry is demonstrated in various ways in addition to the removal from the panel's consideration of one of the two sub-criteria clearly recorded in Part D for purchase units. The missing sub-criterion ended up as an additional sub-criterion for price (as discussed below). Also, the treatment of the purchase units criterion in Part E is quite different from the treatment of the other six quality criteria. Although the Ministry argued that all of the quality sub-criteria assessed by the panel should have been apparent to the Foundation from the 36 questions in Part E, none of those 36 questions is directed to purchase units. At least with five of the six other quality criteria (excluding requirements) there are the headings in Part E recording the abbreviated form of the main criterion. In Part E the reference to purchase units simply appears as a subheading under a main heading relating to price (page 14). This and the remaining pages from Part E do not alert an organisation wishing to make a proposal that it cannot rely on what is recorded for requirements in Part D.

*Price: Ability to deliver a full range of required services across a region at a reasonable price per FTE: 30% of total: 100% of price*

[173] The Foundation's complaint was that two new sub-criteria were added to the main price criterion. There is only one sub-criterion in Part D – "Proposed FTE rate to deliver the Services?". That single sub-criterion, which in Part D therefore represents 100% of the main price criterion, is consistent with the fuller description in the paragraph 48 table.

[174] In appendix 2 for the main price criterion the panel was directed to consider three sub-criteria, not one. The Part D single sub-criterion of the FTE rate is the third sub-criterion in appendix 2. In appendix 2 it is given a weighting of 60% of price, against 100% recorded in the paragraph 48 table. In other words, the value or weighting, as clearly set out for proposers in the RFP, was reduced by 40 per cent. The materiality of that unannounced change is plain.



[175] The two sub-criteria added to the panel's evaluation, and recorded in appendix 2, were as follows:

- (a) "Deliver clinical and PH [public health]". This is the sub-criterion removed from the main purchase units criterion. The addition of this sub-criterion for price was given 25% of the price weighting which represents 7.5% of all criteria. As one of the two sub-criteria of the main purchase units criterion, and assuming that its weighting there was half of the two sub-criteria, it had an overall weighting of only 1.5% (half of the overall 3% for the purchase units criterion).
- (b) The second addition to price was a sub-criterion described as "Ability to deliver as sole provider". This was given a weighting of 15% for price, which represents 4.5% of all criteria.

[176] As earlier noted, Part E refers to the price criterion at page 14 of appendix 1. Part E does not support the Ministry's primary contention that Part E is determinative in respect of sub-criteria. Part E, in relation to price, positively supports the Foundation's arguments as to the primacy of Part D, with that argument in turn fully supported by paragraph 4 and the paragraph 48 table. Part E, at page 14, records one sub-criterion only for price – the FTE rate. Immediately below this is the subheading "Regions, Purchase Units and Scale – 4% of Quality". As made quite clear in Part E itself, this is concerned with the purchase units quality criterion, not with the price criterion. This particular point also demonstrates, here with some emphasis, that the Foundation's arguments in respect of each sub-criterion, as recorded in Part D, do not give rise to inconsistencies.

[177] At the end of appendix 1 (pages 15 and 16) there are two further pages from Part E. These are examples of the remaining pages from Part E. The two pages included, as will be apparent, have specific questions for the Northland and the Auckland regions. There is the same format in the remaining pages relating to each of the other regions. The separate questions here do not assist the Ministry in its argument. A reasonable proposer, reading clause 48, Part D and Part E together, would expect that the questions about the number of regions, clinical intervention

purchase units, and public health, were relevant to the purchase units criterion. Similarly, the question relating to the number of FTEs for clinical and public health services and the average price per FTE are matters of cost efficiency and therefore relevant to this main price criterion.

[178] There is another difficulty for the Ministry's primary argument that Part E prevails over Part D. The Ministry did not also argue that Part E in some way prevailed over the paragraph 48 table, nor could it reasonably argue to that effect. But, in respect of the price criterion, that would have to be part of the Ministry's argument. This is because, as noted above, the full description of the price criterion in paragraph 48 is essentially the same as what is recorded as the single sub-criterion for price in Part D. And this in turn supports the Foundation's argument that Part D prevails for all of the sub-criteria.

[179] The Ministry's treatment of this criterion again involved significant deviations from the RFP, contrary to the rules and contrary to legitimate expectations of the Foundation, and the errors had material consequences. The effect of the error in this instance was very large; the single sub-criterion for price, recorded in the paragraph 48 table as well as Part D, represented not much under half of the weighting for all of the seven other criteria.

#### *The PwC Report*

[180] The PwC report does not provide any evidence bearing on the matters I have discussed. There is a statement, in respect of "key evaluation criteria" that –

information [presumably meaning the RFP] was sufficient and clear for suppliers to know what criteria was [sic] important to [the Ministry] for evaluating suppliers' responses.

[181] I do not agree with this opinion. For the avoidance of doubt I also record that, although the opinion is in evidence, because the PwC report has been produced, it provides no material assistance on interpretation because it simply records a conclusion. There was no analysis recorded in the report of the sort I have undertaken.

[182] The PwC report does record an exception. This is as follows:

Exception noted: Although key evaluation criteria was [sic] listed in the RFP with relative weightings to give clear guidance to RFP respondents, there were minor discrepancies in the weighting information provided in the proposal template (Part E), compared to the Criteria and Weightings section of the RFP (Part B section 48).

However, the correct weightings in Part B section 48 have been used in the proposal evaluations, and the minor discrepancies in the proposal template were not of a magnitude that could have misinformed RFP respondents on the relative importance of MoH's various criteria. In any event, respondents had the opportunity for six weeks to seek clarification of the discrepancies if they were concerned about them.

These anomalies have not resulted in RFP respondents being unfairly disadvantaged.

[183] This does not refer to any of the changes in sub-criteria that I have dealt with in detail. There does not appear to be anything in the PwC report directed to this. The discrepancy referred to is solely in respect of "weighting information". This is clearly a reference to the arithmetical errors in some of the headings in Part E. This is of no moment. It is a matter I earlier referred to in a footnote.<sup>44</sup> PwC said: "...the correct weightings in Part B Section 48 [the paragraph 48 table] have been used in the proposal evaluations". This conclusion is incorrect, for reasons now set out at length.

[184] The statement in the PwC report to the essential effect that the "minor discrepancies" were in any event of no consequence, because proposers had six weeks to seek clarification, is surprising. On the face of it, it reflects the position adopted by the Ministry. There was no reference to the mandatory rules.

*Conclusion on changed sub-criteria and weightings*

[185] I am satisfied that the matters discussed in this section establish material breach of the mandatory rules and of the Foundation's legitimate expectation in respect of the valuation criteria and weightings. This, by itself, is in my judgment sufficient to set the decision aside. But because of the significance of the issues,

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<sup>44</sup> See above at n 43.

including the scope of review, other issues need to be considered. That general observation will apply, without being repeated, for the remainder of this judgment.

***Issue 2(b): Deviation from the RFP: the moderation stage***

[186] This issue relates to the last stage of the panel's evaluation, when it changed the rankings of the proposals, but not the scores, that had been reached at the end of the consensus scoring stage. The Foundation contended that the moderation process was not part of the process set out in, or indicated by, the RFP, and that it was inconsistent with the processes that were set out in, or indicated by, the RFP.

***Evidence on the moderation stage***

[187] There was no contemporaneous document recording the panel's discussions about this stage. The absence of any record in respect of the moderation stage was noted by PwC in its probity review as an exception. This related to a check list item as to whether appropriate records had been kept "to evidence the proceedings and the results of evaluation panel meetings". PwC's draft report, dated 29 November 2013, records the following:

Exception noted, but subsequently resolved: We noted that formal documentation of the proposal evaluations and the method employed in the Evaluation Panel's moderation meeting needs to be more fully documented. We noted that although the proposal evaluations method is described in the Evaluation Pack and supporting documents provided to the Evaluation Panel members, there is no documentation for the method used by the Panel to moderate the proposal evaluation results and to arrive at the final recommended list of providers for thirteen Regions.<sup>45</sup>

In particular, nothing had been formally documented to evidence how in seven out of thirteen Regions, some of the recommended providers were selected ahead of providers whose proposals had scored higher in the proposal evaluation results.

This need was brought to the attention of the Senior Contract Manager and Chair of the Evaluation Panel who subsequently documented the process.

[188] The subsequent documentation of the moderation process, referred to by PwC, was initially contained in a redraft of the recommendation memorandum from Mr Levy to Mr Bartling. The final panel meeting had been on 15 October 2013. The

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<sup>45</sup> There were 13 regions in total. In the final report this was changed to read "in all regions".

original memorandum appears to have been completed around 19 October 2013, after it had been sent to panel members, and there was a revision on about 2 November. The further revision, in response to PwC's comments, was sent by Mr Levy to PwC on 28 November 2013. This included a draft of a new appendix to the memorandum, labelled appendix 7. This is the retrospective documentation. It is headed: "Appendix 7: Panel moderation methodology and process". Appendix 7 does not appear to have been produced in its final form until 18 December 2013, when a further revised memorandum was sent to Mr Bartling. The memorandum as a whole was not produced in its final form until 27 January 2014.

[189] The first part of appendix 7 is as follows:

### **Summary**

Having evaluated all the individual regions and proposals, the panel were in a position to understand how regional and national providers reflect the service mix and need. The panel reviewed the outcome comparing the result of the regional and national providers.

A moderation process was undertaken to enable the Panel to review the preferred provider(s), first for appropriateness to the region and, secondly whether a national provider was able to provide the same or better service for that region.

The following principles were important dynamics that assisted the discussion and balance reached in the final recommendation set out in Appendix 1:

### **Features**

- Regional providers can range in size but often will have a localised focus.
- Some regional providers have significant infrastructure and support networks to sustain a significant local presence and profile.
- By comparison, an incumbent national provider should have an acute awareness of the importance of identifying and relating their particular service delivery model in local conditions.

### **Regional / local providers**

- Consideration was placed by the panel in the first instance on the regional provider(s) ability, capability and presence in the region.
- For an incumbent provider, the expectation of clear evidence and service delivery should be taken in the context of additional considerations such

as the accessibility of the region, the population needs and the ability of the provider to service the region.

- ...
- ...
- ...
- ...
- ...
- Where there was no clear preferred regional provider, the panel moved to consider the service delivery by a national provider.

[190] The Foundation, together with some other organisations such as the Salvation Army, were not classified as “regional/local providers” but as “national providers”. The remaining subsection of appendix 7 relates to national providers. It is as follows:

#### **National providers**

- For national providers, there is a competitive advantage with efficiencies, size and overall resilience.
- The panel considered how the national provider would best serve the local region.
- Examples include the ability to connect with the local community, would the national providers’ reputation resonate with the local community, could the service be better or superior to a local provider?
- For an incumbent provider [that is to say, an incumbent national provider], the Panel agreed that ideally the expectation and standard needed to be significantly higher than the regional provider.
- For example, the addition of multiple co-existing problems, advanced referral pathways, facilitation of clients, and local key local connections [sic] were all considered reasonable expectations from a national provider.
- For new national providers, the standard needed to be equal or superior to that demonstrated by an incumbent national provider.
- Where more than one national provider was delivering in the same region, the panel revisited how that region was specifically described and would support local clients.
- While the response template asked for the identification of the regions that would be delivered, the national provider needed to be specific and demonstrate exactly how that region was going to be serviced.

- This distinction is important as it recognises that while it is expected that there is national delivery framework [sic], that there are in fact regional differences – which are evidenced by the regional proposals that were assessed.

[191] Mr Levy's evidence about the moderation stage was as follows:

72. Moderation represented the final step in the Panel's role. What the Panel sought to do was to ensure that its recommendations reflected members' best collective view of the mix of different types of service providers that would best serve the needs of their communities and across New Zealand.
73. Once the Panel had agreed consensus scores, it stood back and considered whether the results made sense. This process is captured in the Panel Memorandum. As with the Consensus scoring, this step required the exercise of the Panel's collective judgement. However, at this step, the Panel looked beyond the terms of the proposals to focus on, as Appendix 7 of the Panel Memorandum ... sets out, the appropriateness of the providers that scored highest at the Consensus scoring stage for their regions, and whether a national provider was able to provide the same or better service for that region.
74. The principles adopted were that where there was no clear preferred regional provider, the Panel considered the service delivery by a national provider. For an incumbent national provider, ideally the expectation and standard needed to be significantly higher than the regional provider. In essence, these principles were intended to assist the Panel to identify the most efficient and effective mix of provider(s) in each region and nationally, taking into account each region's demographic and gambling harm profile as outlined in the needs assessment and the indicative clinical and public health FTE numbers and the indicative mix of services for each region set out in Part E of the RFP.
75. This was a re-ranking process, in which the scores were not changed, but some of the rankings were shifted. The principles adopted ensured a consistency in approach, in order to achieve sound, robust recommendations that would work in practice.

### *Outline of submissions*

[192] The Foundation contended that the moderation process was not in any way indicated by the RFP, let alone referred to in it; that it was contrary to the evaluation process as expressly recorded in and otherwise indicated by the RFP; and that in consequence the principles that were applied were both unknown to proposers and in conflict with what was recorded in the RFP.

[193] The Ministry accepted that material changes to the processes for evaluation of the proposals introduced at any stage, including moderation if that was a material change, would need to be advised to providers. But it submitted that the moderation process was implicitly contemplated by the RFP; that it was “not only rational and reasonable per se, it also builds on the Consensus Scoring while ensuring that there is flexibility to ‘reach the right decisions’”.

[194] On this issue, unlike the one just considered, the Ministry sought to rely on Part D. The Ministry argued that Part D, coupled with paragraph 4 of the RFP, justified the moderation stage. Paragraph 4 has the unequivocal statement that proposals will be selected based on the Ministry’s evaluation “against the evaluation criteria specified in Part D”. The Ministry noted that the eight criteria set out in Part D are not weighted. The argument that was developed from this was that the RFP indicated that the final decision was not to be based on strictly numerical scores, but an overall evaluation based on the criteria in Part D. The Ministry submitted that all of the moderation principles fall within those criteria, and in particular:

- (a) Under “Delivery of Services” the fourth and seventh sub-criteria - “Knowledge of the sector, including an understanding of the target audience”; and “Ability to undertake work with, *inter alia*, Māori”. The italicised words were the way it was summarised in the Ministry’s submission. The seventh sub-criteria refers also to “Pacific Islanders, Asian, people of different cultures and/or people with disabilities.”
- (b) Under “Experience”: the second sub-criteria – “Successful implementation of previously delivered Services?”.
- (c) Under “Capability”: the second sub-criterion under capability - “Technical ability and experience of the proposed project team to carry out the work?”.
- (d) Under “Alignment”: the second sub-criterion under alignment - “Alignment with a wider provider collective or Whānau Ora collective?”.



*Evaluation of issue 2(b): moderation*

[195] I am satisfied that the moderation stage occurred in breach of the mandatory rules and in breach of the Foundation's legitimate expectation as to both the general nature of processes and the criteria that would be used for evaluation. The moderation process and the moderation "principles" were not indicated in or through the RFP. This conclusion also seems to be implicit in what PwC said about moderation, although they referred expressly only to the absence of any reference in the panel's evaluation pack. The "principles" used at the moderation stage involved the application of essential criteria that were not notified to proposers and which conflicted in material ways with criteria that were notified. The moderation process was in a material way disconnected from the process indicated by the RFP. Those observations capture the essence of my conclusion.

[196] I expand on my reasons in the following paragraphs. The analysis involves consideration of two broad and related matters. The first is whether the RFP indicated that there would be an evaluation process of a nature similar to the moderation stage. The second is whether the moderation stage involved a material departure from what was indicated by the RFP.

[197] The Ministry submitted that a process like the moderation process was implicitly contemplated by the RFP. As an abstract proposition, in relation to evaluation of proposals or tenders in general, a final stage along the lines of an overall review, drawing on the collective experience and expertise of a panel, could often be a process not open to challenge. In fact, a process of that general nature might be expected to be undertaken. The abstract propositions were called in aid by the Ministry. But the general cannot govern the particular. The assessment here has to be made having regard to this particular RFP and to the rules.

[198] An essential argument for the Ministry was that paragraph 4 of the RFP states that proposals will be selected based on the evaluation criteria in Part D and that the evaluation criteria in Part D were not weighted. A preliminary observation in this regard is that the Ministry here was seeking to rely on Part D, and the primacy it is given by paragraph 4, but in respect of the question whether there were changes to

sub-criteria the Ministry said, in substance, that Part D was to be ignored. The Ministry cannot have it both ways. In any event, the proposition that the criteria in Part D are unweighted is an untenable proposition. It is clear beyond reasonable argument that the eight criteria listed in Part D have the weightings recorded for each of those criteria in the paragraph 48 table.

[199] What is indicated by the RFP is a structured process directed to the eight criteria, each of which had a weighting. This necessarily required a means of ranking proposals based on evaluation of each of the sub-criteria for each of the main criteria with the rankings derived from numerical weightings. A scoring system was the obvious means of doing this. That is what proposers were entitled to expect would happen. They did not have to know the detail of the scoring system to have a legitimate expectation in that regard. The process described by Mr Levy is quite unlike anything indicated by the RFP. He came close to saying in his evidence what is apparent: the results up to that point could be ignored. This evidence is discussed further below.

[200] There is other evidence, and being evidence from the Ministry, supporting the conclusion that moderation had in fact not been contemplated. Mr Levy said that “the RFP was the result of a lengthy process”. He explained the process in some detail. A group in the Ministry, known as the Gambling Harm Minimisation Team, was responsible for working on it, but it required approval from, and got approval from, the Sector Capability and Implementation Business Unit Funding Board. The processes and criteria for selecting members of the panel were also carefully monitored within the Ministry with approvals being obtained when required. This resulted in the production of the evaluation pack sent to each of the panel members. The information in the evaluation pack, as earlier explained, contained detailed instructions on the evaluation processes directed to the various criteria, with the weightings, and with a carefully structured scoring system, and with all of this to be brought together at various stages with the use of the computer software. As PwC observed, the evaluation pack made no reference to a final stage of the sort that occurred with moderation. The absence of any contemporaneous record of the panel discussions during the moderation stage also tends to indicate that a moderation stage had not been contemplated in the formulation of the RFP and the provision of

instructions to the panel. This point is given some further emphasis by the exception noted by PwC and the production of appendix 7 over a month after the panel's evaluation had been completed.

[201] The evidence also establishes that the principles used to establish final rankings at the moderation stage involved a major deviation from what was expressly recorded in the RFP. I do not agree with the Ministry's submission that some of the moderation "principles" are indicated by some of the Part D criteria. A preliminary point is that, if the matters taken into account at moderation were as recorded in Part D, they would also be referred to as "criteria" and not "principles". In this context I do not regard that as a mere semantic point of no consequence. What proposers were told in the RFP was that they were to address criteria, which were carefully defined by the sub-criteria. These were not principles. If the matters recorded in appendix 7 flowed clearly from the RFP, why were they not also referred to as criteria? More fundamentally, the principles recorded in appendix 7 of the panel's recommendation memorandum are materially different from the criteria in Part D. As earlier recorded, the Ministry pointed to the wording of some of the sub-criteria in Part D and argued from this that the moderation principles were recorded in the RFP. I do not agree. This part of the Ministry's argument takes isolated words from a few selected parts of one section of the RFP and then points to similarity between those words and what was retrospectively recorded in appendix 7. This is unpersuasive. And it cannot provide any justification for assessing these particular matters, obliquely extracted from Part D, in a manner quite different from the way in which RFP quite expressly indicates that they were to be assessed.

[202] My conclusion that the moderation process, and its principles, involved a major shift from the RFP is in fact implicit in some of what Mr Levy said. In particular his statement:

Once the Panel had agreed consensus scores, it stood back and considered whether the results made sense.

What that necessarily means, and it is borne out by what happened in numbers of instances, is that the carefully structured evaluation of proposals up to that point,

based not only on all of the criteria and sub-criteria in Part D (or in Part E for that matter), and with the carefully structured weightings, could be ignored.

[203] There was strong criticism of the moderation stage, and in particular from Dr Jury, in relation to proper evaluation processes (discussed under issue 4), and from Mr Mullins from a statistician's perspective. I agree with the criticism. Moderation was a major departure from the RFP.

***Issue 2(c): Failure by the Ministry to contact the Foundation about its lead agency proposal***

[204] The Foundation contended: it had a legitimate expectation that the Ministry would contact it to discuss the details of its lead agency proposal; this expectation was founded on the Ministry's prior dealings with it in relation to competitive tenders; and, as pleaded, the Ministry should have sought "further information or ... clarification of any aspect of the Proposals that it did not understand".

[205] Mr Ramsey said that in a previous tender process, the Ministry contacted two providers and suggested that they work together. He said that the Foundation expected it and Hapai to be contacted to discuss their proposal. It was "a concept bid because it required discussion with the Ministry regarding the level of services to be contracted, and implementation". He further deposed that neither the Foundation nor Hapai anticipated that their proposals could be adequately assessed without further discussion or information from the Ministry.

[206] The Ministry's position was that it had, in the RFP, reserved a right to contact proposers to seek further information, but it was under no obligation to do so and the RFP did not indicate a general intention to do so. The most relevant provisions of the RFP, are as follows:

40. In considering your Proposal, the Ministry may ask you for further information, or to verify information, in relation to any aspects of your Proposal.
41. If the Ministry's discussions with the Potential providers or other circumstances make it necessary to extend the indicative date by which the Ministry wishes to select preferred provider(s) as

described in paragraph 15, the Ministry must notify parties who have submitted a Proposal of the necessary extension of time.

...

49. The Ministry may, at its sole discretion, request a shortlist of Potential providers to provide a presentation of their Proposal, skills, experience, key attributes of personnel, and/or to demonstrate an understanding of the Service requirements described in this RFP.
50. Notice of any presentations and an outline of expectations for the contents will be provided to the relevant Potential providers as and if required.

[207] The Ministry also pointed to other provisions in the RFP to argue that it was in the interests of proposers to include as much information as possible (paragraph 2) and that the “responsibility to provide evidence of capability to perform the required Services rests with Potential providers” (paragraph 102). The Ministry argued that, if the Foundation had more information it wanted the Ministry to consider, it should have included this in its written proposals.

[208] Mr Levy said that he did not find in the lead agency proposal a request for a presentation, apart from a statement saying that inflation would need to be “included in any discussion on this proposal”. The Ministry submitted that, in any event, it would have been procedurally unfair to the other submitters to permit the Foundation to make a presentation just because it asked for one.

[209] In the circumstances of this case, and in particular having regard to the terms of the RFP, one previous example of the Ministry seeking further information is insufficient to found a reasonable expectation that the Ministry would act in the same way. The general nature of the overall process – a request for proposals to be evaluated for the purpose of choosing service providers – is not one where the decision maker could be expected to have a responsibility to ensure that proposers or tenderers had put their best case forward. That is a responsibility of organisations making proposals, or tenders. I am not persuaded that there is any justification from departing from that general approach in this case. The Foundation may have hoped it would be contacted, but that is not the same thing.<sup>46</sup>

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<sup>46</sup> *Comptroller of Customs v Terminals (NZ) Ltd*, above n 32, at [124]. See above at [120].

[210] There is one other matter to be noted. There was a question whether one or more of the responsible Ministry officers, or the panel, were “confused” by the lead agency proposal. The Foundation submitted that evidence established they were confused and that this meant that the Foundation and Hapai should have been contacted. Even if the panel, or the responsible officers of the Ministry, found the proposal confusing, a failure then to seek clarification from the Foundation and Hapai would not constitute breach of an obligation owed by the Ministry. In any event, I am not persuaded that what was said to the Foundation, in discussions after the decision was made, indicated that Ministry officers were confused, but that they found the lead agency proposal to be a confused one.

[211] The expectation that the Foundation relies on could not be legitimately held and there was no breach of the mandatory rules.

**Issue 2(d): other complaints of breach of a legitimate expectation**

[212] There were further complaints in the amended statement of claim, as part of the second cause of action, alleging breach of a legitimate procedural expectation. These were not complaints that the Ministry failed to follow its own RFP. Rather it was alleged that the RFP, or the Ministry, failed to comply with some other standard, not clearly articulated. The remaining complaints were:

- (a) The Ministry did not “signal” in the RFP that it intended to make significant changes as a result of the process.
- (b) The Ministry, did not evaluate, score and rank proposals separately for clinical services and public health services, consistently with the RFP.
- (c) The Ministry did not evaluate, score and rank proposals for general services, and dedicated Maori, Pacific and Asian services, consistently with the RFP.

[213] The essence of the Ministry's submissions on the first contention was that the Ministry, in embarking on the RFP, did not have an intention significantly to "reconfigure" the sector. There was no intention to be signalled in the RFP. The changes which did occur were the result of the proposals received and the evaluation of them, not the design of the RFP or a predisposition.

[214] The evidence establishes that there were significant changes. This includes Mr Bartling's evidence as to the impact of the recommendations on the Foundation as the largest provider of problem gambling services in terms of FTEs. There was evidence of a similar nature from Mr Thompson.

[215] The Ministry's evidence and arguments as to its intentions when the RFP was issued, are not readily reconciled with the statement in the 2013-2016 service plan that the Ministry "considers it advisable to broadly maintain its current arrangements with public health service providers for the time being."<sup>47</sup> The RFP followed on directly from this service plan with that statement in it. The RFP was the process for securing public health service providers (as well as clinical service providers). The Ministry's statement in the 2013-2016 service plan, in my judgment, can be construed as a statement of intent. It might have been argued from this that the Ministry was bound to undertake a substantial review of the panel's recommendations because of the recommendation for significant changes and, quite possibly, to notify all of the organisations who had made proposals of the recommendations and invite responses, or propose some other process.

[216] I have recorded those general observations in case they become relevant at a later stage. Notwithstanding those observations, I am satisfied that the Foundation's claim in this regard should be dismissed. The evidence from Mr Ramsey, on the face of it, could not provide a foundation for a legitimate expectation arising from the service plan. His evidence was not founded on the statement in the 2013-2016 service plan. The essence of his evidence was that the RFP gave no indication that the Ministry was seeking to achieve a major change to "the current service provider configuration". I accept the Ministry's evidence that it was not seeking to do that. That, of itself, does not explain the seeming inconsistency between the positive

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<sup>47</sup> See above at [15].

statement of intent in the service plan. But on this issue the Foundation's submissions were not developed to any material extent and there was no argument directed to the statement in the service plan. In these circumstances it would not be right to reach a conclusion against the Ministry on this point without hearing full argument from the Ministry. This particular claim is therefore dismissed.

[217] In respect of the two other complaints of the Foundation, the Ministry submitted that there was nothing in the RFP that suggested that clinical interventions and public health interventions, or general and specialists' services, would be scored separately. The Foundation's submissions in this regard were again not developed to any material extent, and were unpersuasive. I agree with the Ministry's submissions. The complaints do not establish legitimate expectations and, in any event there was no breach, or material breach, given the terms of the RFP. These complaints are dismissed.

### **Issue 3: Mistake of fact or lack of probative evidence**

[218] The heading to this section is taken from the Foundation's pleading of one of its two main causes of action, but it does not capture the substance of the Foundation's contentions. The main thrust of the Foundation's evidence and submissions, to be considered under this heading, was that in various ways the panel's evaluation methodology was flawed, and flawed to an extent which made results at various stages materially unreliable. The Foundation submitted that this in turn means that the final decision was unreliable.

[219] On that last point – that the final decision was unreliable – the Ministry accepted that, if there were material errors leading to the recommendations from the panel, there were no subsequent steps taken by Mr Bartling which in some way cured those errors. I add that I am also satisfied that nothing arising from the PwC report, which was retrospective, in any way altered what had been done in relation to any of the matters to be considered here.



## *Legal principles*

[220] The Foundation submitted that a mistake of fact may amount to an error of law. It relied on the following statement from the Supreme Court in *Bryson v Three Foot Six Ltd*:<sup>48</sup>

[26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable – so clearly untenable – as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs “in which there is no evidence to support the determination” or “one in which the evidence is inconsistent with and contradictory of the determination” or “one in which the true and only reasonable conclusion contradicts the determination”.<sup>49</sup> Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test. ...

[221] *Bryson* was an appeal from the Employment Court. However, mistake of fact has received support as an independent ground in judicial review proceedings.<sup>50</sup>

[222] Ms Chen also cited the decision of this Court in *Zafirov v Minister of Immigration*.<sup>51</sup> Justice Mallon adopted the following statement of the Court of Appeal of England and Wales in *E v Secretary of State for the Home Department*:<sup>52</sup>

First, there must have been a mistake as to an existing fact *including a mistake as to the availability of evidence on a particular matter*. Secondly, the fact or evidence must have been ‘established’, in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal’s reasoning.

(emphasis in the original)

[223] The Foundation’s contentions do not fit neatly into mistake of fact of the sort discussed in those cases. The Foundations contentions do fit more readily into the

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<sup>48</sup> *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

<sup>49</sup> *Edwards (Inspector of Taxes)* [1956] AC 14 (HL).

<sup>50</sup> See for example *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 149 per Cooke J; *Glaxo Group Ltd v Commissioner of Patents* [1991] 3 NZLR 179 (CA) at 184 per Cooke P; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 200 per Richardson J; *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA) at 208.

<sup>51</sup> *Zafirov v Minister of Immigration* [2009] NZAR 457 (HC).

<sup>52</sup> At [78]. *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [66].

need for decisions to be founded on probative evidence, in the sense discussed by Lord Diplock in delivering the judgment of the Privy Council in *Re Erebus Royal Commission*.<sup>53</sup>

The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal in England in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 at pp 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the Judge inquiring into the Mt Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. ...

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

[224] The Ministry did not take issue with the statement of general legal principles. What the Ministry said, including the acknowledgement earlier referred to as to the effect of Mr Bartling's decision, was as follows:

290. The defendant accepts that Mr Bartling's Decision, and the other decisions he made, had to be based on probative evidence. The defendant also accepts that any material mistakes may constitute an error of law. This includes any mistakes made by the Panel in evaluating the proposals, since he has deposed that he relied on their evaluation of the proposals.

The Ministry's position was that the principles did not apply on the facts.

[225] I am satisfied that the Foundation's claims come within the broad principles justifying review under the general heading of mistake. The justification for doing so may be seen by restating the Foundation's broad contentions. The Foundation says that panel members were mistaken in their apparent beliefs that they were using a well-designed evaluation process, that they were correctly implementing the process, that in consequence their conclusions at each stage were reliable, and that those conclusions could be used as a reliable foundation for the next stage.

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<sup>53</sup> *Re Erebus Royal Commission* [1983] NZLR 662 (PC) at 671.

[226] Those contentions of mistakes, or errors, and the consequences of them, may be described generally as “flawed methodology”. When considering whether flawed methodology of this nature can be the subject of judicial review, it is of importance that the Foundation’s evidence that I have considered, and will outline shortly, is not evidence directed to the substantive merit of the decision, or to the substantive merit of preliminary conclusions reached by the panel at each stage. As already indicated, it is evidence to the effect that, because of flawed methodology, various conclusions were unreliable.

[227] I am therefore satisfied that, as a matter of principle, the Foundation is entitled to seek judicial review on the grounds that there were mistakes of the sort described and that, if there were mistakes and they were material, the decision should be set aside.

***The divergent positions of the Foundation and the Ministry as to the nature of the evaluation process***

[228] There was a fundamental difference between the Foundation and the Ministry as to the nature of the evaluation process. The Foundation argued that the evaluation process, other than moderation, was statistical in nature, and that the reliability of the process, and conclusions reached, were properly assessed by a statistician. The Foundation relied in particular on the evidence of Mr Mullins.

[229] The Ministry submitted that the Foundation was wrong; that the Foundation’s allegations were founded on a misunderstanding of the nature of the process; and that, in consequence, the criticisms of Mr Mullins were not relevant.

[230] A conclusion whether the Foundation, or the Ministry, is correct is in considerable measure determinative of this ground for judicial review. This is because, apart from the fundamental difference as to the nature of the evaluation process, the challenge to Mr Mullins’ evidence was very limited.

[231] The Ministry did submit that Mr Mullins, in his first affidavit, had misunderstood one matter of fact. This concerned the way in which Mr Levy had dealt with pre-score spreadsheets, returned from some panel members, with scores

missing for some criteria for some of the proposals and for which Mr Levy then entered a zero. I am satisfied that Mr Mullins did misunderstand, or had not been aware of, the way in which Mr Levy had dealt with many of the zero entries. But I am also satisfied that this has no bearing on the validity of Mr Mullins' overall conclusions.

[232] The Ministry also challenged the admissibility of evidence from Mr Mullins when he commented on a report from Mr Bartling, after the final decision had been made, to the Associate Minister of Health. This evidence has no bearing on the central issues and for that reason I have left it to one side.

[233] There was the evidence for the Ministry from Mr Wotton, the PwC partner. Mr Wotton said that the purpose of his affidavit was to respond to "specific assertions made by Messrs Jury and Mullins" about the quality of the probity report and the conduct of PwC in producing the report and interacting with the Ministry. There is nothing in Mr Wotton's affidavit which touches in any way on Mr Mullins' conclusions as a statistician. The only point made by Mr Wotton was the one earlier recorded: that Mr Mullins was wrong in stating that PwC staff had inspected PDF files of the Ministry rather than looking at the actual spreadsheets. Mr Wotton said that "PwC had access to and relied on the actual spreadsheets and other documents in their native formats". This point has no bearing on the matters I have to consider.

[234] The critical question is whether the reliability of conclusions reached by the panel is something appropriately assessed by a statistician. The way in which proposals were to be evaluated, as recorded in the RFP, indicate that it is. The detailed instructions to the panel in the evaluation pack substantially reinforce what the RFP indicates. For reasons which follow I am satisfied that the most appropriate expertise for assessment of much of the process is that of a statistician.

[235] I will set out the evidence and some submissions relating to the positions of the two parties. The Ministry's position is best explained, initially, in Mr Levy's words. He said:

17. ... [The] plaintiff's witnesses describe a statistical evaluation process. However, that was not the procurement design and the Panel which I led did not undertake a statistical evaluation process. The plaintiff's witnesses appear to have overlooked the fact that the content and quality of the proposals submitted by respondents to the [RFP] played a key role in the outcomes of the RFP process.

[236] Much later in his affidavit Mr Levy said:

127. The plaintiff's witnesses, including its expert witnesses Mr Mullins and Dr Jury, have strongly criticised both the Panel's adoption of this process and its implementation of it. I do not agree with Mr Mullins when he says that the Panel's process was not [sic] statistically-based.<sup>54</sup> It was not. Rather, it was a process which the Ministry frequently uses for RFP panels. The Ministry saw most of the criteria, and consequently the decision-making process, as qualitative rather than quantitative. Panel members brought their broad and varied experience to all three steps of the Evaluation Stage to make the Panel more than the sum of its parts. On that basis, the Panel was confident that its process was fair, consistent with the RFP and met the Ministry's wider strategic goals, including of workability of the outcomes.

[237] The other witness for the Ministry who commented on the nature of the evaluation process was Mr Bartling. He said:

54. I was comfortable with the vast bulk of the Panel's recommendations because I was satisfied that the Panel had followed a robust and fair process for assessing the RFP proposals, and that the process followed would bring about the best outcomes for provision of services to the clients whom the problem gambling service providers support. ...

[238] The submissions for the Ministry included the following:

91. ... it is the defendant's case that the evidence shows that the process adopted was:
- 91.1 qualitative and evaluative not formulae driven and calculated;
  - 91.2 consistent with Ministry practice and wider government procurement practice;
  - 91.3 carried out by qualified people;
  - 91.4 fair and robust due to sound management of conflicts; and

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<sup>54</sup> The word "not" appears in the original affidavit but appears clearly to be an error, as the next sentence demonstrates, as well as all of the evidence and submissions on both sides.

91.5 carefully carried out in separate stages by the Panel and Mr Bartling.

[239] The Ministry's submissions were developed much later as follows:

298. ... Mr Mullins appears to consider the process to be one that should be able to be reduced to a series of formulae and calculations. This assumption is at odds with the qualitative, evaluative criteria and decision making – the human process – that was in fact adopted and carried out.
299. The Ministry submits that the process adopted by the Panel was both consistent with Ministry and wider government procurement practice and entirely appropriate in the context of this specific RFP. The Ministry was entitled to choose any reasonable method of evaluation that it considered would assist it to evaluate the proposals against the criteria in the RFP.
300. Panel members brought their broad and varied experience to all three steps of the Evaluation Stage to make the Panel more than the sum of its parts. On that basis, the process was fair, consistent with the RFP and met the Ministry's wider strategic goals, including of workability of the outcomes.

(footnote omitted)

[240] Mr Mullins responded directly to paragraph 17 of Mr Levy's affidavit and, indirectly, to Mr Levy's other statements, and to the evidence of Mr Bartling. After quoting paragraph 17 of Mr Levy's affidavit, Mr Mullins said:

6. The Panel was instructed to create a number of numerical scores which were summarised using a statistical measure of averaging the data, which was then used for the purpose of producing a consensus score, thus deriving a ranking for each of the providers.
7. In my opinion, based on my 40 years experience as a statistician, this clearly is a statistical process. All of these numbers – raw scores, averages, rankings are known as "statistics" and Mr Levy's comment that it was not a statistical evaluation process is wrong.

[241] Mr Mullins responded directly to paragraph 54 of Mr Bartling's affidavit as follows:

58. At paragraph 54 of his affidavit, Mr Bartling has said that the Panel had followed a "robust and fair process". The "robustness" of an evaluation can be assessed by checking whether small changes in the methodology result in big changes to the final scores. As shown in more detail below, the robustness of this process is seriously in question.

The “detail below” Mr Mullins referred to demonstrated the proposition.

[242] Mr Mullins also responded to a statement by Mr Bartling that he understood Mr Mullins’ analysis to mean that the root cause of the problems with the RFP process was that its basis was qualitative measurement. Mr Mullins said:

69. ... Mr Bartling has misunderstood my point. That is not the basis of my criticism. Qualitative measures are used very frequently in social sciences research, and are amenable to all the usual forms of analysis. In my view, the issue is the Ministry’s poor understanding of how such measures can and should be summarised, and of how to interpret the differences between providers...

[243] This point had been addressed in a different context earlier in Mr Mullins’ second affidavit. He was responding there to a statement by Mr Levy. Mr Levy had noted that there were “occasionally” substantial differences between evaluator’s scores on various sub-criteria and that Mr Levy considered, in his experience, that this was usual. Mr Mullins responded:

22. ... [In] my experience as a statistician, this is quite *unusual*, and substantial differences between evaluators’ scores usually points to a lack of definition in the criteria for evaluation. It is for this reason that there is a considerable body of knowledge in the area of measurement, particularly in the social sciences. The literature on validity and reliability is extensive, and there are scholarly journals which are devoted to issues of measurement using qualitative instruments such as the RFP. Mr Levy does not appear to understand the importance of these issues. A useful summary article discussing these issues, entitled *Validity and Reliability in Social Science Research*, E A Drost, *Education Research and Perspectives* Vol. 38, No. 1.

[244] A copy of the article was produced with the affidavit. Mr Mullins, in his first affidavit, had also referred to statistics being used for qualitative measures. This was in a setting removed from the social sciences, but being just as relevant in demonstrating the application of statistics for qualitative judgments, to test the reliability of results, and to seek to enhance reliability. This related to the approach to individual scores of judges of Olympic diving. The diving judges, for the purposes of this very broad analysis, can readily be treated as the equivalent of the panel members.

*Conclusion on the nature of the evaluation process*

[245] Mr Mullins' opinion that the evaluation process was a statistical process, or at least a large part of his detailed analysis, was directed primarily to the process other than the final moderation stage. Mr Mullins did comment on some aspects of moderation, but my focus in this discussion is on the competing views as to the nature of the process up to the end of consensus scoring. The fact that there was the final moderation stage, with the panel's recommendation to Mr Bartling based on the outcome at that point, does not assist the Ministry, because of my earlier conclusion about moderation. But if that earlier conclusion is left to one side, and if there are material methodology flaws in the process up to moderation, the outcome of the process up to the end of the consensus scoring was plainly intended to provide a reliable foundation for moderation. But it did not. This point is discussed more fully below.

[246] Mr Mullins' opinion as to the nature of the evaluation process is that of a statistician. It is an opinion that was not challenged by any witness with any comparable expertise. This, by itself, is of consequence. In addition, there was no challenge to Mr Mullins' expertise as a statistician. I accept that he was fully qualified to provide expert opinion evidence on statistics and, in particular, in respect of the processes in issue in this case.

[247] Mr Mullins' opinion as to the nature of the process is fully borne out by the content of his detailed analysis in two affidavits. Aspects of this are summarised below.

[248] As just noted, the Ministry's witnesses who touch on this subject – the nature of the process – notably do not include any person presenting expert opinion evidence as a statistician. Mr Levy, who was the principal witness for the Ministry who dealt with this topic, and Mr Bartling, said that Mr Mullins misunderstood the nature of the process. Neither of them claimed expertise as a statistician, and I am not otherwise persuaded by what they say that Mr Mullins was wrong.

[249] The Ministry's evidence is in large measure captured in paragraphs 298-300 of the Ministry's submissions recorded above. I am satisfied that the Ministry in fact



misunderstood Mr Mullins' evidence. The proposition that statistical analysis cannot be used for what is described as "the qualitative, evaluative criteria and decision-making – the human process – that was in fact adopted and carried out", is an assertion without an evidential foundation. I do not accept it. And it is directly contrary to some direct evidence from Mr Mullins earlier quoted, unchallenged and persuasive.

[250] Mr Mullins did not suggest that the process was one capable of being "reduced to a series of formulae and calculations." The answer to that submission is in large measure contained in the preceding paragraph. But the submission is itself at odds with a significant part of what demonstrably occurred in the panel process up to moderation. The specific propositions about formulae and calculations are somewhat pejorative, and in any event unhelpful. Mr Mullins used statistical calculations. This was for the purpose of explaining matters of consequence bearing on his overall opinion that the processes were unreliable. Mr Mullins did on occasion refer to "formulae". The Ministry's criticism of this is somewhat disingenuous. The word was not a reference to mathematical equations. On my reading of Mr Mullins' evidence, it was used as shorthand for clearly defined evaluation methodology, with an opinion expressed in respect of various stages of the process that there was an absence of such "formulae".

[251] The evidence and submissions that the process was "robust and fair" does not advance the case for the Ministry. They are generalised assertions – effectively assertions about the conclusion I have to reach. Whether they are borne out depends on concrete evidence. The only evidence of this nature was that from Mr Mullins. The scope of the PwC review was narrow and did not address the matters dealt with by Mr Mullins. The evidence in submissions that the process was "consistent with Ministry and wider government procurement practice" is another broad contention which does not assist.

[252] This case, like any other, is to be determined on the basis of the evidence. I am satisfied that, in determining the reliability of the evaluation process, the expert opinion evidence of Mr Mullins, as a statistician, is the appropriate opinion evidence. In terms of s 25 of the Evidence Act 2006 I have obtained "substantial help" from it

in understanding whether the methodology produced reliable results or whether it was flawed.

### *Aspects of Mr Mullins' evidence*

[253] Mr Mullins provided detailed evidence in two affidavits. I am satisfied this evidence supports the conclusions reached by him and recorded in his two affidavits. Because there was no challenge to Mr Mullins' conclusions as a statistician, other than on the topic just dealt with, I consider that it is unnecessary to seek to summarise the evidence and conclusions on a number of matters bearing on the question whether there was flawed methodology. This section is therefore intended to capture some aspects only of Mr Mullins' evidence. This is selective and is not intended to convey the substance of all of the evidence. I do this under subheadings intended to catch the essence of the topic.

### *The process was subject to significant "noise"*

[254] "Noise", and its consequences, were described by Mr Mullins as follows:

28. The scoring process used by the Ministry was a measurement process based on qualitative evaluations of a complex organisation, indeed of several complex organisations which were then combined to give a quantitative measure. The objective of such a process is to create a number which in some sense 'captures' the essential value of the organisation under any of the given criteria. Such measurements, of course, are not expected to be precise, nor do we expect all evaluators to come up with the same value for a given organisation and criterion. For this reason, we say that the measurements are made with a certain amount of 'noise' – the noise corresponds to the average difference between the raw observations and their overall average, or possibly an overall score obtained by a 'consensus' process, used here by the Ministry.
29. In this case, because all of the sub-criteria other than Price are measured on a qualitative basis, rather than a strict measurement basis, they are subject to much more 'noise', than a quantitative measure might be.
30. Further, a consensus decision-making process, as used in this case, conceals the degree of disagreement there may be between the various evaluators, and indeed any difference there may be between the consensus view and the average of the raw scores, which were arrived at independently. The use of a consensus decision-making process undermines the initial independence of the various evaluators. Compounding the issues with consensus scoring is the fact that the

individual scores were made in the presence of ‘noise’ as described above. The magnitude of this noise is both unknown and unknowable. This magnitude may be great enough (and in my opinion is likely to be great enough) to obscure any real distinction between tenderers. In addition to this noise, there is also the possibility of biases arising through the mis-application of the chosen statistical measures.

[255] Following this, Mr Mullins examined the sensitivity of the final score to small changes in one or more of the scoring criteria because this, as Mr Mullins put it, “tells us something about the level of “noise” present in the qualitative measurements.” He examined this in reasonable detail in relation to two sub-criteria for two of the main criteria, experience and capability. There was some further analysis of the main alignment and price criteria.

[256] Mr Mullins’ conclusion in relation to the main experience criterion was:

40. Thus, the final score for ‘Experience’ is very sensitive to small changes in the raw average scores for each of the sub-components.
41. This sensitivity is important, as each evaluator, in the absence of strictly formal well-defined criteria for allocating a score to either of these components (as was the case here), may hold quite a different opinion as to an appropriate score for any given tender, which can have a significant impact on the total score achieved.
42. The lack of guidance given to the Panel members on how to make the distinction between Experience and Successful Prior Experience adds considerable ‘noise’ to this criterion.

[257] There were similar findings in the analysis of the three other main criteria. There were added complications in respect of alignment and price which I am satisfied, from Mr Mullins’ evidence, demonstrate material unreliability in the scoring of alignment and price, in addition to the general problem of noise.

*Inter-rater variability: “aberrant scores”*

[258] “Inter-rater variability” was Mr Mullins’ expression referring to differences in the pre-scores of each of the panel members. Mr Mullins’ broad proposition was that what I have called flawed methodology is indicated if there are marked differences in the scores, and that this is compounded if there are no mechanisms (formulae) in place to make appropriate adjustments where there are marked variations. The

second part of the subheading – “aberrant scores” – is my expression to endeavour to capture the point from a layperson’s perspective.

[259] There was a reasonable amount of detail from Mr Mullins on this topic, in both of his affidavits. I am again satisfied from this evidence that there were flaws of methodology which indicate unreliability in results to a material extent. One table produced by Mr Mullins was used to illustrate marked variations and also problems seen to arise from zero scores. The table recorded the scores for the four alignment sub-criteria, as assessed by the panel, in respect of both of the Foundation’s proposals and that of its lead agency partner, Hapai Te Hauora. I will reproduce the table before explaining it.

Quality								Hapai Te Hauora							PGF							PGF - lead
Alignment	Alignment with addiction	8	6	2	8	8	8	6.665667	8	4	2	8	6	8	6	8	4	2	0	6	8	4.666667
	Alignment with Strategic Plan	8	4	8	8	8	8	7.333333	8	2	0	8	8	8	5.666667	8	4	0	0	8	8	4.666667
	Alignment with provider	8	4	8	8	6	8	7	8	6	2	8	8	8	6.666667	8	4	2	0	8	8	5
	Alignment with Whānau Ora	8	8	8	8	8	8	8	8	2	0	4	6	4	4	8	2	0	0	6	4	3.333333

[260] The six columns without headings, which precede the names of the proposers, correspond to the six panel members. The numbers in each column are the scores allocated by the particular panel member to the proposal for the sub-criterion recorded in the left hand side of the table. The number recorded under the name of the proposer is the simple arithmetical average of the six scores. As earlier mentioned in this judgment, a sub-criterion in respect of which the Foundation scored very poorly in consensus scoring was “Alignment with Strategic plan”. It may be seen from the table, but I summarise by way of further explanation of the table, that the individual pre-scores of each of the six panel members for this sub-criterion for the three proposals were: for Hapai te Hauora the scores were 8, 4, 8, 8, 8, 8; for PGF’s standalone proposal the scores were 8, 2, 0, 8, 8, 8; for PGF’s lead agency proposal the scores were 8, 4, 0, 0, 8, 8.

[261] Mr Mullins' discussion in his first affidavit, following this table, continued over some seven pages. In it he discussed in detail the impact of zero values. This remains relevant notwithstanding Mr Mullins' misunderstanding, or lack of knowledge of, a matter of fact earlier mentioned – Mr Levy was able to identify zeroes that had been entered by him where a panel member had not entered any score, and was then able, with advice from the panel member, to enter an actual score to replace the zero. Mr Mullins' extended discussion went in greater detail into the issue of inter-rater variability – what I have called aberrant scores – and the sophisticated methods of statisticians to make proper adjustments for this, but which were absent in the panel process. It may also be noted that the replacement of zero scores, where they were Mr Levy's temporary indicator of a missing value, occurred contrary to the process required in the evaluation instructions. It occurred in the presence of all panel members, and with the individual deciding what score should be entered with knowledge of all other scores. That of itself introduced unreliability.

[262] In his second affidavit, Mr Mullins discussed the panel's consensus score for the Foundation on the alignment criterion in response to an observation of Mr Levy. Mr Mullins' observations in this regard touched on a number of problems that arise and which sophisticated, but well understood, methodology is designed to minimise if not entirely remove. Given the range of problems covered I will set this evidence out in full. The table reproduced above provides a useful background to this discussion.

[263] Mr Mullins' observations in his second affidavit were as follows:

35. At paragraph 69 of his affidavit, Mr Levy states:

the Panel Memorandum ... in the CNS Score column demonstrate(s) the consensus scores for the plaintiff's proposals were well below at least one other proposal in every region, and often below several other proposals.

36. Mr Levy adds that a significant reason for PGF's poor performance was its score on the 'Alignment' dimension. He states "Panel members were simply not able to justify higher scores on the Alignment criterion than those recorded in the consensus score spreadsheets."

37. At paragraph 115 of his affidavit, Mr Levy states that the zeroes that exist in the raw scores for Alignment for PGF are neither missing

values, nor failures in training, and suggests that, rather, they are real scores assigned by one of the evaluators.

38. Given that we have seen no evidence of training, and the fact that evaluators have come up with such different scores for Alignment (i.e. some have scored zero and some have scored 8), this indicates to me that Panel Members likely had very different views of what 'Alignment' consisted of, and what could be categorised as an 'Excellent' response and what was a 'Poor' response. Further, the scores for Alignment may also evidence the effect of one Panel member's influence on the Panel. I note that the section beginning at paragraph 21 of Mr Ramsey's affidavit in reply states that PGF assumed that its proposal as a whole demonstrated 'Alignment with the Strategic Plan'. Given that some evaluators scored PGF an '8' for Alignment, this demonstrates that those evaluators must have agreed with PGF that this aspect of Alignment was well-covered in PGF's proposals.
39. When reviewing the scores of each for the Panel members for the Alignment criterion, it appears that the Panel member, Dion Williams, an official from the Ministry, may have had considerable influence on the Panel and on the consensus scores reached for Alignment. I note that Mr Williams' assessment of the Alignment criterion for all providers other than the Salvation Army and Raukura Pacific, had the effect of lowering the average score, by amounts varying from 2% to 81%. The largest change to the scores for Alignment as a result of Mr Williams scores was for PGF, where the discrepancy was 81%. For the Salvation Army and Raukura Pacific, Mr Williams' assessment was higher than the rest of the Panel's assessment by 7% and 13% respectively. Aside from the PGF change, the largest change to the Alignment scores was a 35% decrease for Transition Out. It appears that Mr Williams' assessments are both very different to the other evaluators', and the final scores for Alignment suggest that he may have had considerable influence in persuading the other evaluators to come closer to his score. This tracking through of the scores for Alignment clearly shows the inherent problems with a process of consensus scoring – it greatly opens up the scoring to the risk of influence and persuasion. The lack of any detailed filenotes from the Panel meetings means that we cannot be certain whether an undue level of influence was applied.
40. From the scores recorded by the various Panel members, I believe that the Ministry personnel collectively had a different understanding of some of the criteria to the other Panel members. Therefore, I checked the average score of the Ministry personnel against the others for the Alignment criterion in the Auckland and Bay of Plenty regions. It is notable that the three Ministry-based evaluators consistently score a little lower than those who were not Ministry-based. This difference is greatest for PGF and PGF as Lead agency. I have checked this overall for Auckland and Bay of Plenty regions, where the same comments hold true.

*Mr Mullins' general conclusions*

[264] In an introductory paragraph in his first affidavit, Mr Mullins said:

19. The errors in the measurement and evaluation process carried out by the Ministry are in my view irredeemable. The more I look at the documents, the more I find wrong with the process. On this basis, I conclude that the outcome of this tender process is unsound.

[265] After considering a range of matters, and in particular the Panel's method of scoring the responses and the influence of noise, Mr Mullins said:

62. The results of the application of the scoring system were intended to form a baseline for the moderation panel to work from in arriving at final scores for the tenderers. However, the incorrect calculations embedded in the worksheets provided convince me that the numbers resulting from this process are essentially worthless for this purpose.

Furthermore, it appears that the Ministry of Health did not have the expertise required to evaluate competitive tenders of this sort, nor do they have the requisite statistical or quality assurance skills necessary to ensure a fair and transparent process. I elaborate further below.

[266] There was then some reasonably detailed analysis of numbers of steps in the evaluation process, by reference to Mr Levy's memorandum to Mr Bartling. Following this, under a heading "How should such a process have been set up?", Mr Mullins said:

65. In general, the best representation of a group of 'raw scores' such as found in this process is something like the average (arithmetic mean) or trimmed mean, or mid-range, or some other straightforwardly calculable summary statistic, rather than a combination of this and an evaluation of how the committee felt about the score afterwards. This aspect of the process invites the intrusion of personal bias, as the evaluators see the various tenders in comparison with each other – and are offered the opportunity to 'nudge' them one way or the other.
66. A robust and transparent process would use a pre-specified method of combining the raw scores; would record and keep inviolate a copy of the original dataset; and would not offer the opportunity for a qualitative post-scoring judgment to be made, except in the case where a tie needed to be broken. Further, all of the evaluators' scores on all the criteria and sub-criteria should be published to all the tenderers, together with the agreed summary statistics (means, medians, modes, trimmed means, or whichever methodology was used), and a measure of the variation between tenders on any of the 25 key areas used to define 'Quality', and of course, Price and its

components. (I have already discussed the deficiencies in the way that Price was evaluated).

[267] The first affidavit has the following conclusion:

95. The lack of clarity and competence, both in the design of the process itself, and in the application of the scoring system means that the chance of the Ministry making a bad or ill-informed decision on the basis of the results obtained from this process is almost inevitable.
96. In particular, distinctions made between tenders on the basis of this scoring system are likely to reflect little more than noise, rather than clear distinctions in overall capability, while opportunities for personal bias to enter the process are myriad and poorly controlled. Errors inherent in the method of calculation further compound these problems.

[268] Overall conclusions of Mr Mullins in his second affidavit, and therefore responding with knowledge of Mr Levy's evidence of his treatment of zeroes which he had initially entered for missing values, as well as with knowledge of the Ministry's more general observations about the nature of the process, were as follows:

*Summary*

3. The evidence filed by the Ministry does not allay my concern that the data on which the Panel recommendations were based was generated by way of a statistically flawed process. The serious mistakes that were made during the process undermine the validity of the Panel's recommendations and, in my view, the Panel recommendations are unsafe and cannot be relied upon.
4. Mr Levy's affidavit raises a number of issues to which I respond in detail below, but in summary:
  - (a) I disagree with Mr Levy's assertion that the process pursued by the Ministry is not statistical in nature.
  - (b) The process as described by Mr Levy is fraught with opportunities for error, and Mr Levy has admitted to making several errors. My concern is how many more errors we would find if there was a proper audit.
  - (c) The treatment of zeroes as explained by Mr Levy is wrong.
  - (d) The mean score, which was the summary statistic chosen to represent the evaluators' scores was incorrectly calculated, or calculated in a way that is not easily verifiable.
  - (e) Contrary to Mr Levy's assertions, it is clear that the Panel members did not all have the same interpretation of the relevant



criteria and sub-criteria, and there were no measures in place to check on this understanding.

- (f) The process of arriving at consensus scores resulted in large modifications to some of the scores, particularly in relation to the Alignment criterion. From a review of the raw scores, it appears that some of the Panel members from the Ministry may have had considerable influence over others in reaching the consensus scores.
- (g) There are no formulae relating to the transfer of prescores to raw scores, nor are there any formulae relating to the conversion of the raw scores to consensus scores. Furthermore, there are no formulae supporting how the final moderated scores were arrived at from the consensus scores.
- (h) The irregularities in the process made a material difference to the final rankings for providers. As illustrated below, if a correct statistical analysis was undertaken, the final rankings would have shifted considerably.

[269] In the immediately following paragraphs, 5 to 7, Mr Mullins responded to Mr Levy's opinion, which I am satisfied Mr Levy was not qualified to provide, that the Ministry did not undertake statistical evaluation process. Mr Levy's evidence (at paragraph 17) of his affidavit and Mr Mullins' response (at paragraphs 6 and 7 of Mr Mullins' second affidavit) are recorded above.

[270] Mr Mullins' second affidavit has the following conclusion:

- 73. I am a consulting statistician, and if asked to consult to the Ministry at this stage on this process, my advice would be to discard the results obtained so far and begin again, assuming that the objective is to obtain a robust and defensible result.

### ***Conclusion***

[271] The evaluation process was a carefully structured step by step process. It must be assumed that there was intended to be a logical and "probative" connection between one step and the next. It is plain from the Ministry's evidence and submissions that this was intended.

[272] At each step in the evaluation process there was a conclusion, commencing with the pre-score of each panel member, through to the new rankings at the end of the moderation process. Apart from the last conclusion, each of the preceding

conclusions was provisional in the sense that it was not the final decision representing the recommendation of the Panel. But the conclusion at each step was nevertheless a conclusion which, given the design of the process, obviously had to be reached before there was a foundation for the next step in the process. Each of these interim conclusions had to provide a reliable foundation for the next step in the process. It had to provide a reliable foundation if there was any purpose in reaching the interim conclusion. The Ministry, understandably, did not suggest that there was no purpose in the various steps with the conclusions along the way.

[273] The consequence of this is that, if there were material flaws of methodology in the process leading to a provisional conclusion which made that conclusion unreliable, the necessary foundation for a valid final decision is absent. The necessary foundation for a valid final decision is certainly absent if there was a series of unreliable conclusions at numbers of necessary stages of the process. None of this was cured by moderation, and there are the separate problems with moderation already discussed.

[274] As I have made clear, I accept Mr Mullins' expert opinion evidence that there was material unreliability. For these reasons I am satisfied that the Foundation's application, on this ground, is also made out.

### **Other complaints of the Foundation**

[275] In addition to the Foundation's complaint about what I have called flawed methodology, the Foundation alleged a reasonably large number of other errors in its pleading of the mistake of fact or lack of probative evidence cause of action. I have concluded that most of them are not made out. I do not intend to discuss these complaints for reasons already adverted to in a different context – it is unnecessary to do so in order to reach a reasoned conclusion on the primary relief sought by the Foundation and to embark on a discussion would add substantially to the length of this already long judgment.

## Issue 4: Conflicts of interest or bias

### *Introduction and legal principles*

[276] The Foundation contends that some of the panel members had conflicts of interest, or apparent bias, and that this was not adequately addressed.

[277] The Ministry contends that, although six of the seven panel members, including Mr Levy, declared actual or “potential” conflicts of interest, or bias, in all instances this was properly managed.

### *Legal principles*

[278] Some of the evidence and submissions referred both to conflicts of interest and to bias. Some cases have treated bias and conflicts of interest as essentially the same.<sup>55</sup> Other cases have treated conflict of interest as an independent ground of judicial review.<sup>56</sup> It is unnecessary to consider the difference for the purposes of this case. If I refer only to apparent bias it may be taken to include apparent conflict of interest, and vice versa. The principal area of dispute between the parties is the standard to which the Ministry should be held in determining whether there were apparent conflicts of interest or bias. More than the standard needs to be determined, but the standard is the key issue.

[279] Mr Andrews accepted an outline of principles provided by Ms Chen. For this reason I will reproduce Ms Chen’s submissions, although more expanded discussion of the principles is required. Ms Chen submitted:

112. The Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* accepted that the correct test for apparent bias was that a Judge is disqualified:<sup>57</sup>

If a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

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<sup>55</sup> See eg *New Era Energy Inc v Electricity Commission* [2010] NZRMA 63 (HC) at [92]; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA) at 148.

<sup>56</sup> See eg *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2 at [91]; *Otago University Students’ Assn Inc v University of Otago* [2010] 2 NZLR 381 (HC) at [57].

<sup>57</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

113. This governing principle also applies to non-judicial decision-makers on the basis of the common requirement of complete impartiality on the part of holders of public office involved in the deployment of governmental power.<sup>58</sup> The High Court of Australia in *Ebner* stated:<sup>59</sup>

Outside the field of company law, rules enforced in respect of local government bodies and other administrative adjudicators have also demanded a strict standard which forbids any pecuniary interest, however small, on the part of a decision-maker. The fact that the decision-maker may have acted honestly is no answer to proof of the existence of such an interest. Indeed, in some cases, the rules applied to administrative decision-makers have been borrowed from the rules regarding the judiciary precisely because of the common requirement of complete impartiality on the part of holders of public office involved in the deployment of government power. In Canada an administrator has been subjected to separate and cumulative grounds of disqualification: both for the presence of a pecuniary interest and for imputed bias.

114. Similarly, it is not simply the decision-maker who must satisfy the reasonable apprehension of bias test. Bias can be fatal to a statutory decision even where the biased official is not the decision maker as he or she contaminates the entire decision-making process.<sup>60</sup> There must be a perception of impartiality on the part of officials whose task it is to advise or assist statutory decision makers and who play a significant role in the making of decisions.<sup>61</sup>

115. In addition Rules 14 and 43 of the Mandatory Rules deal with conflicts of interest [footnote omitted]. They provide:

14. Departments must have in place policies and procedures to eliminate any potential conflict of interest on the part of those engaged in or having influence over a procurement.

...

43. Departments must receive, open and evaluate all tenders under procedures that guarantee the fairness and impartiality of the procurement process.

[280] It is correct that the test stated in *Saxmere*, in a case concerned with an allegation of judicial bias, may apply to administrative decision-makers. The words cited by Ms Chen from *Saxmere* are taken from the decision of the High Court of

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<sup>58</sup> *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [160].

<sup>59</sup> At [160].

<sup>60</sup> *The New Zealand Pork Industry Board v Director-General of the Ministry of Agriculture and Forestry* [2012] NZHC 888 at [204].

<sup>61</sup> At [195] and [203].

Australia in *Ebner*. But that test does not necessarily apply to every administrative decision of a nature which may require management of conflicts of interest and bias. More often than not the standard to apply to administrative decision-makers will be lower, and often substantially lower, than that applied to judges. The context is determinative of the test.<sup>62</sup>

[281] In determining the test, the starting point must be any legislative provisions directed to management of conflicts of interest and bias. Legislative provisions were determinative in the *Lab Tests* case in the Court of Appeal, as discussed below. There are no legislative provisions applying to the panel, or to Mr Bartling as the delegated final decision-maker. However, there are the mandatory rules, and in particular rules 14 and 43 cited by Ms Chen. And there are other types of rules, as noted below.

[282] The other main consideration is the meaning of “apparent” bias – the proper approach to its assessment. The discussion of this topic by Blanchard J in the *Saxmere* case is relevant, notwithstanding the fact that that case was concerned with judicial bias. Omitting observations which apply only to judges and legal processes in a court room, Blanchard J said:<sup>63</sup>

[4] It was pointed out in *Ebner* that the question is one of possibility (“real and not remote”), not probability. The High Court of Australia also warned against any attempt to predict or inquire into the actual thought processes of the judge. Two steps are required:

- (a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
- (b) Secondly, there must be “an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits”.

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<sup>62</sup> *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA) at 548-549; *CREEDNZ Inc v Governor-General*, above n 50, at 194; *Turner v Allison* [1971] NZLR 833 (CA) at 843; *Zaoui v Greg* HC Auckland CIV-2004-404-317, 31 March 2004 at [46] and [107]; *Motor Vehicle Dealers Institute Inc v Auckland Motor Vehicle Disputes Tribunal* HC Auckland M1485-SW99, 21 September 2000 at [79]; *Moxon v Casino Control Authority* HC Hamilton M324-99, 24 May 2000 at [49]; *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 (CA) at 277; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA) at 150; *Hampton v Canterbury Regional Council* [2013] NZHC 2433, [2013] NZRMA 482 at [92]-[95].

<sup>63</sup> *Saxmere Company Ltd v Wood Board Disestablishment Company Ltd*, above n 57 (footnotes omitted).

[5] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. ... Lord Hope commented in *Helow v Secretary of State for the Home Department* that:

“[3] ... before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

[6] The elaboration of the features of the objective observer is, as Kirby J remarked in *Smits v Roach*, reminder to judges, the parties and the community reading their reasons that the standard that is applied is not simply the reaction of the judges to a particular complaint:

“[97] ... It is, as far as it can be, an objective standard: one aimed at emphasising the undesirability of idiosyncratic and personal assessments of such matters. As the cases show, in such decisions different judges can reflect different assessments and reach different conclusions. The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case.”

...

[9] It is important to bear in mind also, as Merkel J pointed out in *Aussie Airlines*, that the issue is not whether it would be better that another judge should have heard the case, but whether the judge who sat may not have brought an impartial and unprejudiced mind to the resolution of the questions for decision. Nor is it simply a matter of whether a judge has conducted himself in accordance with guidelines for judicial conduct. A failure to do so, though it may be open to criticism, may well have no bearing on a question of apparent bias.

[10] Finally, and perhaps most obviously, the matter is not to be tested by reference to the perhaps individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all. Nor is it to be tested by reference to any statements by the judge as to what did or did not have an influence. The Court is not making a judgment on whether it is possible or likely that the particular judge was in fact affected by disqualifying bias and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously.

[283] In *Lab Tests* the Court of Appeal allowed the appeal against the High Court decision that there had been a relevant conflict of interest, because it concluded on the facts that there had been no breach of statutory rules for management of conflicts of interest.<sup>64</sup> The Court of Appeal disagreed with the Judge's conclusion that the scope of the duty was to be assessed on the basis that the duty arose not only from the rules in the statute, but also from a public law duty to conduct public affairs with probity.

[284] The Court of Appeal did not hold that general public law principles could never apply to decisions by public bodies in relation to tenders, requests for proposals, or similar processes. But it did make some broader observations. Although these arose from observations in the *Pratt Contractors* case, a case concerned only with contract law, they have some relevance by way of background and contrast to the matters I am required to consider. Arnold J, speaking for himself and Ellen France J, said:

[51] In relation to public law standards, McGrath J noted at para [97] [in *Pratt Contractors*] that it was inevitable within a small market that those involved in assessing tenders would have settled views, based on prior knowledge, about particular tenderers (at [97]). As long as this did not inhibit the exercise of genuine judgment, the existence of such views was desirable. The Judge also said at para [98] that there was a danger in judicial scrutiny of judgments in this area "if the Court applies standards akin to those required in judicial review proceedings involving the exercise of statutory powers". He said at para [98]:

"We do not consider there is a contractual obligation on Transit to avoid conducting its evaluation in a way which would leave a statutory officer open to judicial review for apparent bias. It is only such conduct as demonstrates there was actual unfair dealing in the application of its contractual obligations which can amount to a breach of contract."

[52] In the Privy Council Lord Hoffmann, delivering their Lordships' advice, said:

"[3] At the centre of the dispute lies the question of the extent to which the procedure for competitive tendering should be judicialised. Tenderers naturally want to be judged independently on their merits by an impartial selector and given the opportunity to rebut any suggestions of demerit which they regard as unfair. The parties who invite tenders, even if they are public authorities like Transit, want to be able to choose in what they consider to be their best commercial interests and not be hobbled by quasi-judicial procedural rules."

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<sup>64</sup> *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2 at [99]-[100].

[53] Lord Hoffmann went on at para [46] to agree with Finn J's dictum in *Hughes Aircraft Systems International* at p 42 that an implied duty of good faith and fair dealing:

“... does not *as such* impose on [the employer] under the guise of contract law, the obligation to avoid making its decision or otherwise conducting itself in ways which would render it amenable to judicial review of administrative action.”

His Lordship said that the duty of good faith and fair dealing required Transit to treat the tenderers equally (in the sense of judging them by the same criteria). But it did not mean that the evaluators could not come to the process with previously formed views about the merits of contractors, nor did they have to act judicially (at para [47]).

[285] In *Lab Tests* Hammond J delivered a separate judgment. He agreed with the result and, “in general, with the reasoning” of Arnold J.<sup>65</sup> He said that he added “some broad comments on the proper scope of judicial review in a case such as” the one before him because it was an important administrative law case. The Judge made some observations in relation to administrative decision-making which might be seen to echo in the public law field some of the general observations made in *Pratt Contractors* in relation to transactions governed by contract. Mr Andrews cited part of this passage. Hammond J, after referring to the reason why there was no relevant breach on the facts, continued:

[401] But even leaving those problems to one side, and the very real complications caused by the statutory context, there is the huge difficulty that effectively the Court is being asked to do what Parliament itself has not done. In New Zealand today there is considerable movement in and out of government and governmental agencies. Difficult conflict issues are created. Whatever one thinks about their efficacy, there is no doubt that the prevailing ethos of public administration is that these things have to be “managed”, rather than prohibited *per se*. Of course some jurisdictions have endeavoured to enact what could be broadly termed “probity in government” measures which, as I apprehend it, have created their own significant difficulties. But there must be huge difficulties, as Mai Chen has put it, “in applying the conflict of interest rules without disqualifying all potential candidates with requisite experience and expertise because they operate in the particular sector” in a “small democracy” such as New Zealand (“Crown Entities Act: 18 Months on” (2006) NZLJ 315, p 320). And institutionally, what might be termed the ripple effect of the so-called ethics in government/no conflict rule that Mr Hodder is propounding would be rather more of a tsunami.

[402] The practical solution to conflicts problems of the kind complained of in this instance lies in the careful drafting of legislation and contracts, and the quality patrolling of conflicts regimes. Conflicts of interest are not in

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<sup>65</sup> At [348].



themselves unethical. The ethical challenge resides in the recognition and management of them

[286] A question that arises in this case is whether those general observations have any application. For reasons I will come to I am satisfied that they do not.

***Context: The rules about conflict of interest and bias in this case***

[287] As already noted, and unlike the circumstances in *Lab Tests*, there are no statutory provisions prescribing the way in which conflicts of interest, or bias, for the panel or individual panel members, should be dealt with. However, there are four sets of rules which were binding on the panel and its members and which in substantial measure determine the test to be applied in this case.

[288] The first set of rules are the mandatory rules. The most relevant rules, 14 and 43, were referred to in Ms Chen's written submissions and noted earlier in this judgment. The discussion earlier in this judgment in relation to the application of rules such as these, and the consequence of breach of the rules, applies in relation to conflicts of interest and bias. The only comment to add is that, although rule 14 refers in express terms only to "potential conflict of interest" I am satisfied that it includes actual conflicts of interest (as it must do) and bias and apparent bias.

[289] The second set of rules was the Ministry's ethical code of conduct. Mr Levy referred to the ethical code of conduct when discussing a declaration by one of the Panel members, Mr Williams, of potential bias. Mr Williams was a contract manager for some of the organisations making proposals. Mr Levy referred to the following provision in the Code:

As with all panel members, relevant discussion and consideration of all proposals are to be based on the content of the proposals presented. Prior knowledge or comments outside of the proposal content are specifically excluded.

[290] The third set of rules came from directions to panel members in declarations they were required to sign. This included Mr Levy. Aspects of this are discussed below in a summary of declarations by the panel members, and how matters were dealt with.

[291] The fourth set of rules were what amounted to a voluntary code of conduct agreed to by all of them. This expanded on the Ministry's code of conduct. What was agreed by Panel members was explained by Mr Levy in his affidavit, in paragraphs recorded in the background section of this judgment (at [35]). Paragraphs 64 and 65 of Mr Levy's affidavit record an agreement that panel members would have regard only to the content of the proposals and exclude all prior knowledge. I will refer to this as "the personal knowledge exclusion rule". This rule may be likened in a general way to the direction given by a judge to a jury to decide the case before them solely on the basis of the evidence presented to them in the court room. I am satisfied that the personal knowledge exclusion rule, and the consequences of any breach of it, is to be applied and assessed on the same basis as the mandatory rules.

***Conflict declarations by panel members and management of conflicts***

[292] All panel members were required to fill in and sign a document described as "Conflict of Interest and Confidentiality Agreement". The relevant part requires a declaration of "any actual, potential or perceived conflicts of interest". The panel members were required to tick "Yes", "No", or "Potentially" in response to five questions bearing on possible conflicts of interest and bias. "Potentially" was defined as meaning "if others could perceive you have a conflict". Five panel members responded "Yes" or "Potentially" to some of the questions. I will summarise these responses in the following paragraphs together with the way in which these declarations were dealt with.

[293] The second page of each declaration has the panel member's signature and, for the six scoring panel members, Mr Levy's signature confirming his review of the declaration as the panel chair. With Mr Levy's declaration the review was signed by Mr Bartling. All of the declarations and reviews are dated 30 September 2013. The review section refers to "the next part of the form". This is the third page and is headed "Conflict of Interest Management Plan". The third page was required to be completed if there was a "Yes" or "Potentially" response. The third page of Mr Levy's declaration does not appear to have been put in evidence. (I am not suggesting that anything turns on that.) Those that have been put in evidence record

the action taken as a consequence of the declaration, and I will note this below. All of these are also dated 30 September 2013. 30 September 2013 was the date of the first meeting of the panel members. It is apparent that all action was taken on this day, and after all pre-scoring had been completed.

[294] I will now outline the facts relating to each of the declarations.

[295] Mr Levy declared that he was potentially biased; he responded “Potentially” to the following question:

Are you aware of anything that could give the appearance that you might be biased towards or against a particular supplier?

This was explained as follows:

I may have a perceived conflict of interest as I am the contract manager for some of the submitters to the RFP. I am however a non scoring Chair and am to facilitate discussion, maintain procurement processes and protocols and ensure the panel are able to participate fully in deliberations.

This was accepted by Mr Bartling.

[296] Mr Dion Williams was a senior contract manager for the Ministry. His response was the same as Mr Levy’s; he declared that there was a potential appearance of bias because he was contract manager for some of the organisations making proposals. Mr Levy said in his evidence that the Ministry considered that this was managed because “All Ministry employees are bound by ethical codes of conduct”. Mr Levy referred to the obligation arising from the code, recorded above at [289]. Page 3 of the declaration – the “Conflict of Interest Management Plan” – signed by Mr Williams and Mr Levy, records a different reason for the decision that Mr Williams could remain on the panel. The following is recorded under the heading “Action”:

The declaration is acknowledged and has been reviewed. The panel member has extensive knowledge of the problem gambling sector. As such, the professional acumen, subject matter and ability to deliver an accurate assessment far outweighs the perception identified. The involvement and input by the panel member is therefore without restriction.

As noted below, there is identical wording on page 3 for two other panel members, Ms West and Mr Everist. Even the formatting is the same.

[297] Mr Fa'amatuainu Pereira was one of the three scoring members of the panel who was not also a Ministry officer. Mr Pereira declared an actual conflict in respect of one proposal, and the "potential" that others could perceive that he had a personal interest in the purchasing decision. This was on the basis that a direct member of Mr Pereira's family was on the board of trustees of an organisation, South Seas Healthcare Trust, and the Trust had submitted a proposal in partnership with another organisation, Raukura Hauora. Mr Levy said that "the Ministry decided that he should not score or discuss the affected proposal", but that he could score and discuss other proposals, including proposals in competition with the affected proposal. The management plan declaration, signed by Mr Pereira and Mr Levy, records under Action:

The disclosed Conflict of Interest will be resolved by removing the score of the panel member from the Raukura Hauora Pacific assessment (Auckland region).

The emphasis has been added. The pre-scoring by Mr Pereira had already occurred. It is apparent that pre-scoring by all panel members had occurred before the declarations. Zeroes were entered in Mr Pereira's pre-scoring sheet for Raukura Hauora Pacific. He did participate fully in all other aspects of the panel's evaluation of all other proposals. It was subsequently discovered that Mr Pereira had misunderstood the relationship between the South Seas Healthcare Trust and Raukura Hauora Pacific; the former did not make a proposal in partnership with the latter, but was a subcontractor to the latter.

[298] Ms Jude West was another outside member of the panel. Ms West ticked "Potentially" in response to a question: "Do you have any personal obligations, loyalties or bias that could influence the way you evaluate offers and recommend purchases?". She ticked "Yes" to the question Mr Levy and Mr Williams indicated "Potentially" – that is: "Are you aware of anything that could give the appearance that you might be biased towards or against a particular supplier?". This was because Ms West had been an employee of the Foundation from 2005 to August

2013. In his evidence Mr Levy said in respect of Ms West, and also in respect of Mr Ben Everist whose declaration is noted next:

The Ministry considered that as both members were no longer in the employment of the affected organisations and neither had any involvement with, or interest (financial or otherwise) in, their previous employer, both members could continue as members of the panel.

The management plan signed by Ms West and Mr Levy records a different reason for the decision that Ms West should remain on the panel. It was identical to that for Mr Williams.

[299] Mr Ben Everist was another Ministry officer on the panel. At that time his position was Portfolio Manager, National Health Board. In response to the question whether he had any personal obligations, loyalties or bias that could influence the way he evaluated offers – the question to which Ms West answered “Yes” – he answered “Potentially”. It is difficult to read the copy of Mr Everist’s declaration, but it appears that the reason he gave was:

Working relationship with Inspiring Ltd whilst in the Tokoroa Control Sector. Worked ... [?] had a relationship with most of the providers.

Inspiring Ltd is an organisation which made a proposal for a number of regions. Mr Levy in his affidavit said that Mr Everist “was previously employed by a Crown agency that engaged with the problem gambling sector.” As noted above, Mr Levy’s evidence was that the Ministry’s conclusion in relation to Mr Everist’s declaration was the same as the conclusion in response to that of Ms West. The management plan declaration, signed by Mr Everist and Mr Levy, was identical to that for Ms West and Mr Williams, and, therefore, again different from the reason given in evidence for continuing with Mr Everist on the panel.

[300] The remaining panel members were Ms Kirsty Pleace and Mr Chas McCarthy. Both answered “no” to all five of the questions directed to bias and conflicts of interest. Ms Pleace was Senior Advisor, Operational Policy, Regulatory Services in the Department of Internal Affairs. Mr McCarthy was in the Ministry of Health. His position was Senior Contracts and Relationship Manager, Māori Health

Service Improvement, Sector Capability and Implementation Business Unit Funding Board.

*Other evidence*

[301] Part of the remaining evidence was from Mr Mullins. Aspects of this have already been outlined. This is important evidence indicating a real, and not remote, possibility of a logical connection between personal knowledge of the proposers and the possibility of deviation from the standard. It is important evidence because it is unchallenged in relation to the conclusions reached by an expert and an expert whose independence was not in question. Mr Mullins pointed to objective indicators, from statistical analysis, of at least the possibility of bias. Some of Mr Mullins' specific conclusions perhaps take matters beyond possibility, but it is unnecessary to investigate this; it simply lends weight to evidence of apparent bias.

[302] Much of Mr Mullins' evidence as to the possibility of bias did not identify individuals, at least by name, but I am satisfied that, if the evidence does establish the possibility of bias, it is not necessary in this case to identify individuals. The concern is with decision making by a panel. If it is possible that a conclusion at one or more of the panel evaluation stages was affected by bias, to an extent that makes the particular conclusion unreliable, that, in my judgment, is enough. There was further evidence from Mr Mullins which went beyond opinions of possible bias affecting the panel's conclusions in this general way. There was analysis of individual scoring, with indications of the possibility of bias arising at that point. One prominent example of this, explained in some detail, was what Mr Mullins described as "inter-rater variability" and which I described as "aberrant scores". Mr Mullins did explain that things such as this might have arisen for reasons other than bias. He referred on a number of occasions, as did Dr Jury, to indications of a lack of adequate training. But the existence of more than one possible cause of aberrations in scoring, or other indicators of things going wrong, does not remove the possibility of bias having had a material influence.

[303] Mr Mullins' evidence at some points did go further. There was, for example, the evidence which was recorded above in the discussion of Issue 3, at [262]-[263]. Mr Mullins there referred specifically to scoring by Mr Williams, one of the Panel members from the Ministry.

[304] There was also relevant evidence from Dr Jury (and not subject to the Ministry's objection). Dr Jury referred to an email from Mr Williams to Mr Levy dated 22 November 2013. Mr Williams commented on a further draft done by Mr Levy of the proposed memorandum from the panel to Mr Bartling. Mr Williams said:

Only minor comment is that when looking at an overall picture of the Rotorua region – it appears to be too high on clinical FTE. I would suggest that this is likely to mean the targets are too high for the providers in the region and they will not meet targets. Personally I would recommend decreasing Te Kahui FTE by 2, or at least 1 FTE.

Te Kahui Hauora Trust was an organisation that made a proposal to provide services in the Bay of Plenty region.

[305] Dr Jury said:

I am surprised at this comment. I do not consider this to be a "minor point". I regard it as a major concern that reflects a significant weakness in the process. Also it reflects, in my view, that Dion [Williams] does not understand the requirements of a well-run procurement process. I would have expected that the Ministry would set the appropriate number of FTEs per area based on the actual need, *rather than on the perceived capacity and capability of an existing provider*. It also seems to me to be rather late in the process to be discussing the appropriate number of FTEs for a region, when the Panel evaluations had already been completed. Although 1 to 2 FTEs may seem minor, this could be a significant proportion in terms of the size of the local provider. At the very least I would have expected a comment of this nature to have been referred back to the Panel to provide further input. I have not seen any evidence that this was discussed with the Panel members. (emphasis added)

[306] A little later in his affidavit Dr Jury discussed the moderation stage and was very critical of it. He said:

In my experience, moderation is usually an independent review process often carried out externally, to verify the consistency of an internal process. The moderation process adopted by this Panel was not a true "moderation". In reality, the Panel's moderation process was a subjective overlay of the

scoring process based on the individual opinions of each of the Panel members. The moderation process altered the rankings of providers in a substantial way, in an unregulated fashion.

[307] Dr Jury referred to changes in rankings of proposals for the Bay of Plenty region as an example of what he was describing. He provided a table which recorded the changes in rankings for all of the proposals at three stages: prior to moderation, at the conclusion of moderation, and in the memorandum that later went to Mr Bartling. This is as follows, with the numbers being the rankings at each stage:

Ranking prior to moderation	Ranking after moderation	Ranking in Memo
1 Salvation Army	1 Salvation Army	1 Te Kahui Hauora Trust
2 PGF Standalone	2 Anglican Care	2 Salvation Army
3 Woodlands Centre	3 PGF Lead Agency	3 Anglican Care
4 Anglican Care	4 Woodlands Centre	4 PGF Lead Agency
5 Hapai Te Hauora Tapui	5 Te Utuhina Maraakitanga	5 Woodlands Centre
6 PGF Lead Agency	6 Te Kahui Hauora Trust	6 Te Utuhina Manaakitanga
7 Te Utuhina Manaakitanga	7 PGF Standalone	7 PGF Standalone
8 Tuhoe Hauora	8 Tuhoe Hauora	8 Tuhoe Hauora
9 Te Kahui Hauora Trust	9 Hapai Te Hauora Tapui	9 Hapai Te Hauora Tapui

It can be seen that Te Kahui Hauora moved from ninth to sixth at the conclusion of moderation, but was placed first (or at least first for the provision of services for Maori) in the memorandum that went to Mr Bartling.

[308] Mr Levy, after describing what I have called the personal knowledge exclusion rule, in the paragraphs of his affidavit recorded in this judgment at [35], continued as follows:

66. No Panel members made comments about personal experience with particular providers, *although many of the respondents were known to members of the Panel*. Rather, where *a proposal* described a provider's past experience and/or provided cogent examples of that experience, that was considered – as all Panel members could then evaluate the information provided.

(The first emphasis is added. The second emphasis is in the original).



[309] Having regard to the principles already outlined, when considering whether there is apparent bias, which in many cases will in substance be an enquiry as to the possibility of unconscious bias (as more fully discussed below), the fact that no panel member made a comment about personal experience does not diminish the possibility of apparent bias. What is relevant is Mr Levy's statement, which amplifies the individual declarations of panel members, that *many* of the organisations making proposals were known to members of the panel.

[310] In the next paragraph of his affidavit Mr Levy said:

67. ... It was clear to me from the discussions over the course of three days, that the Panel members had all read the proposals carefully and had the same understanding of what the criteria and sub-criteria meant. However, it was also clear to me that in Prescoring individual Panel members had, in some cases, relied on or inferred information relating to particular criteria and sub-criteria that simply was not present in the proposal being considered, whether in the sections that specifically related to the criterion or sub-criterion being considered or elsewhere in the proposal.

[311] I pause here, in what is primarily an outline of evidence, to observe that the second sentence, in evidence for the Ministry, is reasonably telling in indicating the presence of apparent bias or, which in this context is the same thing, breach of the various rules. If some of this was detected and adequately corrected in the panel discussions, it is at least a real possibility that this occurred on a number of other occasions.

[312] PwC, in its Probity Report, noted a possible exception in relation to potential conflicts of interest declared by two unnamed panel members. From the context PwC was obviously referring to the declarations from Mr Pereira and Ms West. The report records that the PwC personnel had compared the scoring patterns of both of the panel members relative to the scoring of other panel members "to see whether there was any significant deviation in their scoring which might indicate any bias in their scoring." No evidence to that effect was found. It may be noted, in respect of matters discussed in issue 3, that the experts engaged by the Ministry used statistical analysis for this purpose. Moving back to the current issue, this conclusion by PwC, when compared with Mr Mullins' opinions, is not inconsistent with Mr Mullins' opinions. There was evidence from Mr Mullins directed to deviations or differences

between the scoring of the panel members from the Ministry and the external panel members. It appears that PwC did not make any similar analysis in respect of scoring by panel members from the Ministry. PwC did not make any reference to the relevant declarations from the three Ministry employees on the panel (Messrs Levy, Williams and Everist). The report concluded, picking up the earlier reference to a possible exception, as follows:

Despite finding no evidence, the MoH should remain aware that the market could perceive that these two panel members could have unduly influenced other panel members' scoring of proposals in the joint panel moderation sessions.

## **Assessment**

### ***The standard to be met by the panel***

[313] There was a submission for the Ministry, as I understood it, to the essential effect that a conflict of interest, or bias, would not provide grounds for setting the decision aside unless it had features analogous to fraud, corruption or bad faith, taking this from an observation in *Lab Tests* earlier discussed.<sup>66</sup> The Ministry submitted that the Foundation's allegations came nowhere near to establishing conflict or bias having those characteristics.

[314] I agree that the Foundation's allegations do not give rise to any suggestion of features analogous to fraud, corruption or bad faith. Allegations of that nature did not form any part of the Foundation's case. But I do not agree that the Court of Appeal's observation has any application to what has to be determined at this point. The Court was not defining a test for determining whether there is actual or perceived conflict of interest or bias. Nor was it seeking to prescribe a standard to be met by a panel evaluating proposals in response to an RFP. The Court was there considering the scope of judicial review. The standard to be met, here by the evaluation panel, depends on context as already discussed. The first thing to determine is the standard applying to this panel. Whether there is in this case apparent bias or conflict of interest must be assessed against the correct standard.

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<sup>66</sup> *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 2, at [91].

[315] The matters of context for determining the standard to be met by the panel are the mandatory rules, the Ministry's ethical code of conduct, the personal knowledge exclusion rule, and the effective directions to panel members in the conflict declarations. These rules must be assessed together. There is no conflict between parts of any of them. Each reinforces the other. In my opinion these rules, assessed in this way, make two things clear: the standard required to be met by the panel was a high one; and that it is a standard which requires the question whether there was apparent bias in this case to be determined by applying the principles outlined in *Saxmere*, as earlier discussed and discussed further below.

[316] The applicability of the *Saxmere* test, notwithstanding that it was expressly directed to judicial bias, is made clear enough by the personal knowledge exclusion rule, especially when considered in conjunction with the terms of the mandatory rules 14 and 43. As earlier noted, the personal knowledge exclusion rule is not very different from what is required of a jury in a criminal trial. This points to a marked difference between the way in which this Panel was required to conduct itself and the situations discussed by Hammond J in *Lab Tests*, and by the Court of Appeal and Privy Council in *Pratt Contractors*, where already existing knowledge of evaluators could be used in an evaluation, and in fact might be expected to be used in an evaluation.

[317] Mandatory rule 14 required "policies and procedures to *eliminate* any potential conflict of interest" (emphasis added). "Eliminate" is a strong word. And what is required to be eliminated is not just actual conflicts of interest, but any *potential* conflict of interest. "Potential" is clearly shorthand for apparent conflicts or bias. This is made clear in the definitions in the conflict of interest declaration form. Mandatory rule 43 required evaluation of all of the proposals "under procedures that *guarantee* the fairness and *impartiality* of the procurement process" (emphasis added). "Guarantee" is also a strong word.

[318] A further consideration, bearing on the standard, is that there is what can be described as a "trade-off" between the imposition of a particularly high standard on the panel, for the benefit of those making proposals, and the consequences of a different approach which could provide benefits of a different kind to proposers.

The different approach is, and perhaps commonly would be, what was contemplated in the discussions in *Pratt Contractors* and *Lab Tests*: an evaluation in which the evaluators, individually and as a panel, are entitled to take account of their personal knowledge of proposers. This would be knowledge of any matters – good, bad or indifferent. In such circumstances, an organisation making a proposal which, to the knowledge of one or more of the evaluators, has an established presence in the particular sector or market, and which has demonstrated its ability to meet whatever the evaluation criteria are, would reasonably be entitled to expect that this would be taken into account. And such an organisation would also be reasonably entitled to expect that the evaluator, and the panel as a whole, in assessing a proposal for another organisation, would take into account any knowledge of performance by that organisation in respect of relevant criteria. This would also mean that organisations with an established record for provision of services of quality would expect to have an advantage over organisations new to the sector or industry, as well as an advantage over organisations already in the sector, but with a poor record.

[319] There is one other matter to be noted in setting out the reasons why a high standard is properly imposed. It is apparent that some, if not all, of the panel members would already have had knowledge about the Foundation and some, such as Ms West, detailed knowledge. There are others who had knowledge, and it would appear in some cases a good deal of knowledge, about other organisations making proposals. It appears from the evidence provided by the Ministry that some of the panel members also had, or had had, at least a working relationship with some of the organisations making proposals. This existing knowledge and the associations were known to the Ministry. Given the content of the rules an obvious question is why these particular people were selected.

[320] In *Lab Tests*, Hammond J, in the passage earlier cited, suggested that in New Zealand there may be a small pool of qualified evaluators in the different areas of the public sector. This point was given emphasis by Mr Andrews. Hammond J's observations were obiter, and they were not presented by the Judge as observations founded on evidence in the case before him.

[321] There was no evidence in this case that the Ministry had no option but to select panel members who not only may have known about proposers in a general way, but who had actually had dealings with one or more of the organisations and, it appears in some cases, to a reasonable extent. The Ministry, understandably and quite properly, wanted panel members who, collectively, would have an appropriate range of experience and skills. The evidence establishes that some of the experience and skills sought for the panel could come from, and did come from, people who had not worked in the problem gambling sector. This is made clear by the declarations from Ms Pleace, who had relevant expertise but no conflict of any sort, and Mr McCarthy, who was from the Ministry, but also had no conflict of any sort. There was also evidence of other people proposed for the panel, and who had been approved for that purpose by the independent Sector Capability and Implementation Business Unit Funding Board. But in the end some of these people were not on the panel. Some of those who were were selected at a very late stage. Dr Jury was critical of this part of the process. This perhaps indicates why the problems arose with this panel. But the point of primary relevance in the matters now being discussed is evidence that practical constraints, which may be described as a “small pool”, cannot be brought into account to justify inclusion in the panel of panel members who had existing knowledge of numbers of organisations making proposals and, in some cases, extensive knowledge. In any event, it would not in some way remove the consequence of any apparent bias.

[322] Mr Levy gave evidence indicating that some panel members would have to be people with expertise, or experience, or both, in relation to problem gambling. My observations are not in any way intended to suggest that that was not appropriate. The need for some panel members with those qualifications could readily have been accepted without evidence. But this does not then mean that such panel members also had to be people who had knowledge of organisations making proposals, beyond broad general knowledge, let alone panel members who had had extended dealings with organisations making proposals. There was no evidence to suggest that the knowledge of the problem gambling sector that was required for some of the panel members needed to go beyond knowledge of a general nature in respect of such matters as: the way in which problem gambling may arise; appropriate strategies to seek to prevent or minimise it; types of treatment that are or

might be available; strategies adopted in New Zealand; strategies adopted overseas; and so on. It is not apparent from the evidence in this case that the Ministry could not have got Panel members with that type of expertise and experience who also had not had dealings with organisations making proposals.

***The two step preliminary analysis***

[323] Adapting what was said in *Ebner* and applied in *Saxmere*, the first step is to identify what it is said might have led a panel member to evaluate proposals other than in accordance with the rules. This is plain; with all of the panel members who acknowledged potential bias or conflicts, it was existing knowledge of, and in some cases existing or prior association with, one or more of the organisations making proposals.

[324] The second step is to articulate a logical connection between panel members' existing knowledge of, and prior associations with, proposers, and the "feared deviation from the course of" evaluating the proposals other than in accordance with the required standard. A logical connection is equally plain.

***Assessment as a fair-minded lay observer***

[325] The remaining task is to step into the shoes of the fair-minded lay observer and in doing so to apply the relevant assumptions and qualifications – the guidelines – outlined in *Saxmere*; that is to say, how the hypothetical observer should assess whether there may have been a deviation from the standard and the conclusion the observer would reach.

[326] In *Saxmere*, Tipping J succinctly summarised the enquiry as being whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased in favour of one of the parties in that case.<sup>67</sup> He expanded on the notion of "unconscious bias" as follows:

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<sup>67</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, above n 57, at [37].

[41] The reference in the test to the judge being unconsciously biased reflects the difference between apparent bias and actual bias. That difference is captured well in the expression “more apparent than real”. If the judge or other decision maker is said to have been consciously biased, the case, if established, will amount to one of actual bias. Hence, in cases like the present, when, appropriately, there is no allegation of actual bias, the proposition must be that the bias which is said to be apparent was of an unconscious kind.

[327] In my respectful opinion, this description and discussion of the nature of the mental element is of considerable assistance in the analysis required; that is certainly so in the circumstances of this case. The standard to be met by each of the panel members required four of them somehow to exclude from their evaluations, not only the possibility of a general disposition for or against organisations with whom they had had some association, but also to exclude from their thought processes, including subconscious ones, all the knowledge they already had about particular organisations. And that meant exclusion not only of information not in a written proposal, but exclusion of information which might be consistent with, or supportive of, information which was in a proposal. The same applied to Mr Levy in his management of the discussions. Putting the matter this way does not involve a statement of a standard which would be impossible to attain and, for that reason, one that cannot be justified. The concern here is not with the standard. That has already been dealt with.

[328] Referring to unconscious, or subconscious, deviation from the standard also does not lead to an “attempt to predict or inquire into the actual thought processes” of the panel members, as discussed in *Saxmere*. That is not possible, but it is also not required.

[329] The discussion here of the nature of the mental process requiring consideration is relevant to the objective appraisal by the fair-minded observer. It is obviously essential to know what the observer is considering, or looking for. This is no more than whether there is a *possibility*, “real not remote”, of unconscious deviation from the standard; not a probability.

[330] I refer to “deviation from the standard”. In *Saxmere*, Blanchard J said, in relation to judicial bias, that it was not simply a matter of whether the Judge had

conducted himself in accordance with guidelines. The reference to deviation by panel members from the standard is not an indication of an inquiry at this point going no further than to determine whether there was breach of a code, when that may have had no bearing on a question of apparent bias. The standard here is the touchstone for the central inquiry.

[331] The objective assessment is not to be “unduly sensitive or suspicious”. Nor is it to be “complacent”. I am satisfied that a conclusion that there is the possibility of bias, real and not remote, would not be the result of undue sensitivity, or mere suspicion. Nor would it be speculative. It is a conclusion that follows with a degree of force from all of the matters discussed to this point.

[332] A contrary conclusion would require a degree of complacency about the capacity of human beings to exclude from their minds information on the very subject they are considering and central to their conclusion. That would be difficult for an experienced judge. Here there is no evidence that those required to achieve this feat had any training, or relevant experience of consequence, in objective evaluation. To conclude that there was no real possibility of apparent bias would require a conclusion that the panel members who had prior knowledge, or association, or both, were all capable of constructing some form of Chinese wall in their minds. Preventing the flow of impermissible information through conventional Chinese walls, by prohibiting contact between groups of individuals in the same organisation, is not easy, and is not always sufficient to prevent a reasonable apprehension of an inappropriate exchange of information. The task of panel members, or the difficulty for panel members, was greater to a material extent.

[333] It also has to be borne in mind that the concern is not confined to the possibility that a panel member may have been unconsciously influenced, by prior knowledge, for or against a specific aspect of a proposal. But this was possible in my judgment. Nor is the concern confined to the possibility of more general unconscious impermissible influence, for or against an organisation, from prior knowledge or association. But in my judgment this also was a real possibility. The concern is also with the possibility that a panel member’s assessment of information fully recorded in a proposal might be subconsciously reinforced because it was



consistent with what was already known, and with this resulting in, for example, an absence of a critical appraisal directed solely to the information in the document. In my judgment this too was a real possibility.

[334] The discussion to this point is based on the approach of the hypothetical objective observer, using general knowledge of the behaviour of human beings, applied within the *Saxmere* guidelines, and having regard to the relevant factual context of this evaluation process in this case. It is the way in which many, and perhaps most, cases of alleged apparent bias have to be decided. Taking proper account of Kirby J's caution – that this appraisal, in the end, is based on a hypothetical construct, so that it cannot be a scientifically objective standard of measurement – I have come to the conclusion that apparent bias is established in this case.

[335] That is a conclusion which I consider can properly be founded on the rules coupled with the Ministry's own evidence that five of the seven panel members had relevant knowledge. This evidence is what is critical when related to the rules. There is other evidence for the Ministry that the panel's decisions were unaffected by prior knowledge and prior associations, but that is not to be taken into account. Also irrelevant to the ultimate question as to whether there was apparent bias is the evidence from the Ministry that the Ministry officers considered that declarations of potential conflicts or bias had been adequately managed. If the question of management of conflicts was relevant, then in my judgment this matter was not properly managed. On an objective assessment there was apparent bias because the Ministry established an evaluation panel with five of its seven members armed at the outset with knowledge they were then required somehow to eradicate, not just from their conscious thoughts, but also from their subconscious minds. It is a real possibility that these panel members may not have brought impartial and unprejudiced minds to their evaluations. All of them expressly stated, for the various reasons they also stated, that there was the possibility that, in effect, they might not meet the standard. If this had happened with a judge, the judge would be disqualified. If it happened with a juror, the juror would be stood aside. The reasons for this are the reasons why I consider the declarations to be important evidence in support of the conclusion already reached that there was apparent bias.

[336] There was also Mr Levy's evidence of the extent of prior association or knowledge – "many of the respondents were known to members of the Panel". And there was his evidence that it was clear to him that in pre-scoring, panel members had "in some cases, relied on or inferred information." As earlier noted, this is fairly telling. The statement, read in its full context, could point to more than unconscious bias, but it certainly points to a real possibility of unconscious bias – that is, apparent bias. It is also of some significance that all of the pre-scoring had been done before the panel members met for the first time, completed their declarations and, where required, the management plan, and before they discussed and agreed to the personal knowledge exclusion rule.

[337] There was the evidence from the PwC probity report. This also is evidence supporting a conclusion of apparent bias, here directed to Ms West and Mr Pereira. In this context it is an assessment from an outsider.

[338] Finally, there is the evidence of Mr Mullins and Dr Jury. This is not evidence from the Foundation itself about its reaction and which, if it was, would not be relevant. Although it is evidence called by the Foundation, it is independent, expert opinion evidence. And Mr Mullins' evidence is a type of evidence which is seldom likely to be available in a case concerned with apparent bias. But it is available here because the form of adjudication was a statistical evaluation process. This evidence provides solid support for my conclusion that apparent bias is established.

### **Should the decision be set aside?**

[339] Although I have concluded that the Foundation has established the grounds for review, a discretion remains to determine whether the decision should be set aside.

[340] The Ministry submitted that there were four reasons not to set the decision aside:

- (a) The first was that the errors were minor. I do not agree.

- (b) The second was that the Ministry will not be able to implement the changes to the sector that it considers are better aligned with the strategy and the service plan. That necessarily assumes that the outcome of the process produced a reliable result, and I have concluded that it did not.
- (c) The third was that “the RFP will likely have to be re-run” under the service plan for 2016 to 2019. This is not a persuasive reason to exercise the discretion against the Foundation, given the extent of the breaches I have identified, but also because the RFP in this case was in any event for contracts only up to 30 June 2016.
- (d) The final reason is the impact on those organisations who submitted proposals and were about to be awarded contracts. An adverse consequence for third parties is always a matter of some weight on exercise of a discretion of this nature. In the end, I am not persuaded that it has sufficient weight to withhold from the Foundation the relief to which it would otherwise be entitled, having succeeded on three grounds involving substantial error. Also, the conclusions I have reached mean that it may be that one or more of the organisations who were to be awarded contracts only got to that point as a consequence of the errors that have been established. And it may be that others did not get to that point for the same reason.

[341] I am satisfied that the Foundation is entitled to the relief it seeks.

## **Result**

[342] The Ministry’s decision made on or about 20 March 2014 is set aside.

[343] The Foundation is entitled to costs. The parties are to confer on the question of costs. If agreement cannot be reached as to the quantum of costs, assessed under appropriate provisions of the High Court Rules, submissions are to be filed. Submissions for the Foundation, which are not to exceed ten pages, should be filed and served within six weeks of the date of this judgment. Any submissions in reply

for the Ministry, also not to exceed ten pages, should be filed and served within the following four weeks.

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Woodhouse J

## APPENDIX 1



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### Request for Proposal (RFP)

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24 July 2013

#### **PROPOSALS FOR REGIONAL AND NATIONAL SERVICES TO PREVENT AND MINIMISE GAMBLING HARM<sup>68</sup>**

1. ...
2. This RFP sets out the Ministry's procedures and requirements for Proposals, which all potential providers must follow in formulation of their Proposals. Additional technical and descriptive information may be included where you wish to do so. If you are in doubt about the relevance of providing information, we advise that the information should be included rather than omitted.
3. The Ministry is open to your suggestions as to approaches that demonstrate the effective delivery of the required Services in the most cost-effective way.
4. The Ministry will select the preferred Proposal(s) based on its evaluation of the Proposals against the evaluation criteria specified in Part D. The Ministry and the preferred provider will then enter into negotiations with a view to entering a contract on the basis of this request for proposal (RFP) and the indicative contract terms attached to this RFP (see Appendix A).
5. ...

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<sup>68</sup>

*"Gambling Harm" has the meaning set out in the Gambling Act 2003 and:*

*"(a) means harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling and*

*(b) includes personal, social or economic harm suffered –*

- (i) by the person, or*
- (ii) by the person's spouse, civil union partner, defacto partner, family, whānau, or wider community; or*
- (iii) in the workplace; or*
- (iv) by society at large.*

## **PART A – INTRODUCTION and BACKGROUND**

### **Request for Proposal format**

6. The format of this RFP is as follows:

...

#### **Part C – The Services**

Provides information on the service requirements and scope.

#### **Part D – Proposal Evaluation Criteria**

An overview of the RFP evaluation criteria is included to assist Potential providers to understand the relative importance of the price and non-price attributes.

#### **Part E – Format and Information Required**

Sets out the information to be provided by Potential providers in their Proposals.

...

7. ...

...

8. ...

9. ...

10. ...

11. ...

12. ...

13. ...

## **PART B - PROCEDURE AND TIMETABLE**

### **Submission of Proposal**

#### **Closing Date and timetable**

14. ...

15. ...

#### **Format of Proposals**

16. ...

17. ...

18. Proposals must follow the format of the response template in Part E of this RFP.

19. ...

20. ...

21. ...

22. ...

#### **Proposal Costs**

23. ...

#### **Enquiries**

24. ...

25. ...

26. ...

27. ...

28. The Ministry will post a copy of all properly authorised written questions, without indicating the source of the query, along with the answers on the GETS website. All potential providers who have downloaded the document from the GETS website will be notified by GETS that there is additional information available in relation to this RFP.

29. ...

30. The Ministry may also issue clarifications or changes to this RFP through GETS. All notices issued on GETS will become part of this RFP.

#### **Confidentiality**

31. ...

32. ...

33. ...

34. ...

## **Ownership of Proposal documents**

35. ...

36. ...

## **Proposal selection process**

**[This refers to Parts C and E but still seems to be part of the initial assessment – minimum standards.]**

37. The Ministry must be satisfied that the Proposal meets certain eligibility criteria before your Proposal may be selected and consideration given to entering into a contract with you.

38. The criteria for your Proposal to be an eligible Proposal are that the Ministry is satisfied that:

- i. your Proposal complies with the requirements of this RFP;
- ii. you have the ability to provide the Services specified in Part C;
- iii. your response to the questions in Part E of this RFP demonstrate your ability to provide high quality Services to the Ministry.

39. ...

40. ...

41. ...

42. The Ministry reserves the right to:

- i. accept or reject all or any Proposal(s);  
...
- viii. amend this RFP, or any associated documents, by the issue of a written amendment notice;  
...
- xi. negotiate and/or conclude a formal contract with any party, whether or not that party has submitted a Proposal;  
...
- xiv. not accept the lowest priced Proposal(s);

43. ...

## **Evaluation criteria and weightings**

**[This is the same font as the previous sub sub headings but clearly moves from the preliminary requirements to the evaluation.]**

44. Proposals will be evaluated against the criteria and weightings, which will be judged by the Ministry at its sole discretion.

45. Potential providers **must** first meet the Minimum Standards set out below. Potential providers should note that these Minimum Standards are **mandatory** and that failure to provide adequate evidence of how these standards are met may result in exclusion from the tendering process:



<b>Minimum Standards</b>	
Response format	Proposals are formatted and answered sequentially in accordance with all questions in Part E
Insurance	Confirmation that the organisation has adequate insurance cover
Referees	Details of at least two referees for whom you have provided and demonstrated the ability to provide these (or similar relevant) Services
Statement of Compliance	The Statement of Compliance is completed
Declaration for Potential providers	The Proposal is signed by an authorised signatory
Declaration of Interest	The Conflict of Interest declaration is completed

46. Each Potential provider(s) complying with the Minimum Standards will then be subject to a quality and commercial evaluation. The quality analysis will:
- ensure the Potential provider(s) have met the service requirements as set out in Part C – The Services; and
  - ensure the Potential provider(s) have answered the questions in Part E – Information Required.
47. The commercial analysis will ensure the Potential provider's financial offer provides value for money in relation to their quality score.
48. The criteria and weightings for the quality and commercial aspects of the evaluation are set out below:

<b>Price / Quality Ratio</b>		<b>Criteria</b>	<b>Weighting</b>
Price	30%	Ability to deliver a full range of required services across a region at a reasonable price per FTE	30%
Quality	70%	Organisational strength and stability requirements	12.5%
		Ability to deliver the required Services	15%
		Successful experience in delivery of similar services	7%
		Capability of staff proposed to deliver the required Services	15%
		Alignment of Services with the health and social service sector	10%
		Performance and Quality measures to ensure the quality of Services	7.5%
		Ability to deliver all clinical and public health services required in a region	3%

### **Shortlist presentations**

49. ...

50. ...

## **PART D - PROPOSAL EVALUATION CRITERIA**

100. Potential providers **must** first meet the Minimum Standards set out in paragraph 45. Subject to complying with the Minimum Standards the following criteria will be used when assessing the Proposals received and selecting the preferred provider (if any). The criteria are not in any particular order.

### **Delivery of Services**

- i. Understanding of the requirements?
- ii. Demonstrates how the Services will be delivered?
- iii. Innovative practice and/or thinking in relation to service delivery models?
- iv. Knowledge of the sector, including an understanding of the target audience?
- v. Innovative practice and/or thinking in relation to the organisational structure for delivery?
- vi. Any proposed subcontractors have the appropriate experience and a sound working relationship with contractor?
- vii. Ability to undertake work with Māori, Pacific Islanders, Asian, people of different cultures and/or people with disabilities?

### **Experience**

- i. Experience in the provision of the required Services
- ii. Successful implementation of previously delivered Services?

### **Capability**

- i. Knowledge of appropriate and relevant recruitment, training and retention pathways for staff?
- ii. Technical ability and experience of the proposed project team to carry out the work?

### **Alignment**

- i. Knowledge of the wider addiction treatment sector and opportunities for synergistic alignment of the preventing and minimising gambling harm sector and other addiction services?
- ii. Alignment with a wider provider collective or Whānau Ora collective?

### **Outputs and Outcomes**

- i. Performance measures and quality measures proposed?

### **Requirements**

- i. Management team experience with the sector and/or the services?
- ii. Service provider governance team experience with the sector and/or the services?
- iii. Explanation of conflicts of interest or potential conflicts and how they will be managed?

### **Purchase Units**

- i. Ability to deliver both public health and clinical services in preferred regions?
- ii. Ability to deliver all purchase units in region?

### **Price**

- i. Proposed FTE rate to deliver the Services?

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## **PART E – FORMAT INFORMATION REQUIRED**

101. This section outlines the information to be provided by potential providers in their Proposals that will be assessed in the evaluation process.
102. The responsibility to provide evidence of capability to perform the required Services rests with the Potential providers. However, any Proposal submitted in response to this RFP will be treated as approval for the Ministry to make whatever searches and investigations it deems necessary in order to confirm the Potential provider's capability to provide the Services.
103. Formatting your Proposal in accordance with the sequence of questions in this Part E is a Minimum Standard. However it is **not** necessary to fit your response into the tables below. Potential providers may reproduce these tables in order to fully answer each question. Note however that a response is required for each question. Where a question is deemed not applicable please note this clearly.

**[Pages 20-24 set out tables containing questions relating to the seven quality criteria. I will need to review that detail but have not reproduced it here.]**

**Note that these tables record percentages for each of the main criteria as a portion of quality as a whole (rather than as part of quality 70% of the total). Some of the percentage calculations are wrong. Mullins may have noted this. I have written in the correct percentages – which are rounded up. Given the extensive use of these tables with percentages and weightings it is surprising, to say the least, that there are so many simple mistakes.]**

## PART E – QUALITY EVALUATION - 70% of total

### PART E - Information about Potential Provider's (Minimum Standard) – 18% of Quality

#### COMPANY PROFILE

	INFORMATION REQUIRED	PROVIDER INFORMATION
<b>1</b>	Organisation Name	
<b>2</b>	Legal Trading Name (if applicable)	
<b>3</b>	Postal and Service Address (contact address for all correspondence regarding this RFP)	
<b>4</b>	Contact person responsible for communication relating to this RFP	Name: Role:
<b>5</b>	Other contact details to be used for correspondence regarding this RFP	Telephone: E-mail:
<b>6</b>	GST registration number	
<b>7</b>	PerOrg or Provider number (for organisation's who have previously held a Ministry contract)	
<b>8</b>	Governance Structure	
<b>9</b>	Management Structure, including key managers relevant to delivery of the required Services	
<b>10</b>	Size of the organisation, including - staff numbers - annual turnover	
<b>11</b>	Outline and describe the proposed organisational structure specific to the delivery of the Services	

FINANCIAL INFORMATION		
	INFORMATION REQUIRED	PROVIDER INFORMATION
12	<p>Your Proposal should demonstrate the financial stability of your organisation</p> <p>For example, you could include an Annual Report or an independently audited financial statement or unqualified position statement from a Chartered Accountant</p> <p>Please also include an overview of other contracts held and services delivered by your organisation</p>	
INSURANCE		
13	Specify whether you have, or will obtain, adequate insurance to cover any liabilities that may arise from providing the required Services	
CONFLICTS OF INTEREST		
14	Detail any existing or potential conflicts of interest related to your Proposal and/or the provision of services, and how you would manage or resolve those conflicts.	
CONFIDENTIALITY		
15	If you consider any parts of the Proposal should be held confidential, you must indicate the reasons why	
16	Describe the arrangements you have to ensure client confidentiality (compliance with the Privacy Act [1993]; and Health Information Privacy Code 1994 and commentary [2008 edition])	

<b>PART E – Delivery of Services – 24.5% of Quality</b>		
	<b>INFORMATION REQUIRED</b>	<b>PROVIDER INFORMATION</b>
<b>17</b>	Describe your understanding of the requirements of this RFP, including your understanding of the target audience(s)	
<b>18</b>	Describe how the required Services in this RFP will be delivered in a culturally appropriate way to: <ul style="list-style-type: none"> <li>- Māori clients,</li> <li>- Pacific clients,</li> <li>- Asian clients</li> </ul>	
<b>19</b>	Describe how the required Services in this RFP will be delivered to people with disabilities	
<b>20</b>	Describe any alternative or innovative delivery Proposals you wish the Ministry to consider	
<b>JOINT-VENTURES or SUB-CONTRACTING</b>		
<b>21</b>	<p>If you intend to enter a joint venture or employ sub-contractors in order to provide the Services, each such party should be identified clearly in your Proposal</p> <p>Please describe the relevant skills and experience proposed sub-contractors bring to the delivery of the Services</p>	

<b>PART E – Potential Provider's Experience – 7.5% of Quality</b>		
	<b>INFORMATION REQUIRED</b>	<b>PROVIDER INFORMATION</b>
<b>22</b>	Provide details of your experience in the provision of the required and / or relevant services, including evidence of successful implementation	

<b>PART E – Capability of Potential Provider’s – 21.5% of Quality</b>		
	<b>INFORMATION REQUIRED</b>	<b>PROVIDER INFORMATION</b>
<b>23</b>	Where known, provide a list of names, titles, roles, expertise and background experience for those proposed to manage and deliver the required Services  Copies of curriculum vitae can also be included	
<b>24</b>	Where staffing is not known presently, please provide an explanation of where and how staffing will be recruited	
<b>25</b>	Explain your gambling harm minimisation workforce recruitment, training and retention pathways	

<b>PART E – Potential Provider’s Alignment – 14% of Quality</b>		
	<b>INFORMATION REQUIRED</b>	<b>PROVIDER INFORMATION</b>
<b>26</b>	Describe the alignment that exists between your proposed services to prevent and minimise gambling harm with the wider addiction treatment sector	
<b>27</b>	Describe how you will work with other providers to deliver all the purchase units? Evidence of relevant related examples is desired	
<b>28</b>	Describe how your Services will align at a local, regional and national level with the Preventing and Minimising Gambling Harm Strategy 201/11 to 2015/16	
<b>29</b>	Describe your organisation’s involvement in any regional provider collectives, including the name of organisations involved in the collective, the nature of the collective, and how the collective would add value to the delivery of the Services under this RFP	

<b>30</b>	Describe your organisation's involvement in any Whānau Ora collectives, including the name of the collective and the organisations involved in the collective, and how the collective would add value to the delivery of the Services under this RFP	
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#### **PART E – Outputs and Outcomes – 10.5% of Quality**

	<b>INFORMATION REQUIRED</b>	<b>PROVIDER INFORMATION</b>
<b>31</b>	Describe any desired outputs and outcome measures that might be used to establish performance indicators and targets	
<b>32</b>	Demonstrate how you will ensure the Services to be provided will be of excellent quality  For example, you could describe your internal quality assurance processes	

#### **PART E – Requirements (Minimum Standard)**

<b>REFEREES</b>		
	<b>INFORMATION REQUIRED</b>	<b>PROVIDER INFORMATION</b>
<b>33</b>	<p>Please include details of at least two referees that can be approached and for whom you have provided and demonstrated the abilities to provide these Services either in part or in full.</p> <p>Please include:</p> <ul style="list-style-type: none"> <li>• the name of the referee;</li> <li>• the telephone number and email address of the referee's key contact person;</li> <li>• an overview of the referee and its business;</li> <li>• an overview of the services provided to the referee;</li> <li>• the period over which the services were provided.</li> </ul>	



LEGAL OBLIGATIONS		
<b>34</b>	Confirm that you have completed and attached the “Statement of Compliance / Non-Compliance” attached as Appendix B.	
<b>35</b>	Confirm that you have completed and attached the “Request for Proposal” Declaration attached as Appendix E.	
<b>36</b>	Confirm that you have completed and attached the “Conflict of Interest Declaration for Potential Provider’s” form attached as Appendix F.	

## PART E – PRICE EVALUATION - 30% of total

### PART E – FTE Rate - 100% of Price

#### Regions, Purchase Units and Scale – 4% of Quality

Potential providers are required to identify which region(s) they wish their Proposal to be considered for, the scale of service your organisation is capable of providing in each region, and the specific purchase units proposed to be delivered.

Providers must clearly record their interest in being considered for the delivery of all or some of the services the Ministry proposes to procure to prevent and minimise harm from gambling in each region. Providers must circle Yes or No in box A for each of the 13 regions. Further details are only required for regions marked Yes.

Providers who wish to be considered for more than 1 of the 13 regions are required to submit a separate response for each region, including any providers who wish to be considered for national services.

Providers are required to complete all boxes under each region they wish to submit for the delivery of services. Any boxes that are not relevant must be marked **N/A**

The 13 regions are defined as follows:

Region	Area (km <sup>2</sup> )	Population
Northland	13,941	158,300
Auckland	5,600	1,507,700
Waikato	25,598	416,200
Bay of Plenty	12,447	277,200
Gisborne	8,351	46,800
Hawke's Bay	14,164	155,000
Taranaki	7,273	110,100
Manawatu-Wanganui	22,215	232,500
Wellington	8,124	490,100
Tasman / Nelson / Marlborough	22,715	140,700
West Coast - Canterbury	68,682	591,700
Otago	31,990	211,300
Southland	34,347	94,900

The regions are defined by the regions and territories of New Zealand defined within the Local Government Act 2002. Specifically the Ministry refers to Part 1 of Schedule 2 of the Local Government Act 2002 (regional councils) and Part 2 of Schedule 2 of the Local Government Act 2002 (territorial authorities)<sup>69</sup>. The boundaries for regions are defined in Part 3 of Schedule 2 of the Local Government Act 2002.

NB: the Ministry has combined the Canterbury and West Coast regional councils to form one region, and also the Nelson city council, Tasman and Marlborough district councils to form another.

<sup>69</sup> <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM174258.html>

NORTHLAND REGION		
<p><i>Indicative need for services to prevent and minimise harm from gambling:</i></p> <ul style="list-style-type: none"> <li>• <b>3.0 FTE clinical intervention</b> (General and/or Māori services)</li> <li>• <b>2.0 FTE public health</b> (General and/or Māori services)</li> </ul>		
	INFORMATION REQUIRED	PROVIDER INFORMATION
<b>A</b>	Please include your interest in being considered for the delivery of services to prevent and minimise harm from gambling in the Northland region	YES / NO
CLINICAL INTERVENTION PURCHASE UNITS		
<b>B</b>	Please clearly identify the clinical intervention purchase units your organisation proposes to deliver.	
<b>C</b>	Please record the number of clinical intervention FTE your organisation proposes to deliver.	
<b>D</b>	Please clearly identify the average price per FTE that you propose to deliver the clinical intervention Services.	
PUBLIC HEALTH PURCHASE UNITS		
<b>E</b>	Please clearly identify the public health purchase units your organisation proposes to deliver.	
<b>F</b>	Please record the number of public health FTE your organisation proposes to deliver.	
<b>G</b>	Please clearly identify the average price per FTE that you propose to deliver the public health Services.	

AUCKLAND REGION		
<p><i>Indicative need for services to prevent and minimise harm from gambling:</i></p> <ul style="list-style-type: none"> <li>• <b>30.0 FTE clinical intervention</b> (General, Māori, Pacific and/or Asian services)</li> <li>• <b>20.0 FTE public health</b> (General, Māori, Pacific and/or Asian services)</li> </ul>		
	INFORMATION REQUIRED	PROVIDER INFORMATION
<b>A</b>	Please indicate your interest in being considered for the delivery of services to prevent and minimise harm from gambling in the Auckland region	YES / NO
CLINICAL INTERVENTION PURCHASE UNITS		
<b>B</b>	Please clearly identify the clinical intervention purchase units your organisation proposes to deliver.	
<b>C</b>	Please record the number of clinical intervention FTE your organisation proposes to deliver.	
<b>D</b>	Please clearly identify the average price per FTE that you propose to deliver the clinical intervention Services.	
PUBLIC HEALTH PURCHASE UNITS		
<b>E</b>	Please clearly identify the public health purchase units your organisation proposes to deliver.	
<b>F</b>	Please record the number of public health FTE your organisation proposes to deliver.	
<b>G</b>	Please clearly identify the average price per FTE that you propose to deliver the public health Services.	

## APPENDIX 2

### SUMMARY OF INDIVIDUAL QUESTION WEIGHTINGS

Quality	Criteria	Weighting	Sub-criteria or Questions	Subweighting	Question from Response Template
	Requirements	12.5	Governance	25	8
			Management	35	9
			Financial viability	25	12
			Conflicts of interest	15	14
				100	
	Delivery	15	Viable organisational structure	15	10
			Innovative practice or structure	10	11
			Understanding requirements	5	17
			Knowledge of sector	15	17
			Work with Māori	10	18
			Work with Pacific	5	18
			Work with Asian	5	18
			Work with Disabilities	5	19
			Demonstrate how services delivered	20	18 – 21
			Innovative service delivery models	10	20
				100	
	Experience	7	Experience	60	22
			Successful prior experience	40	22
				100	
	Capability	15	Technical ability	70	23
			Recruit and train	30	24/25
				100	
	Alignment	10	Alignment with addiction treatment sector	40	26
			Alignment with Strategic Plan	30	28
			Alignment with provider collective	15	29
			Alignment with Whanau Ora collective	15	30
			100		
Outputs and Outcomes	7.5	Quality measures	50	32	
		Performance measures	50	31	
			100		
Purchase Units	3	Deliver all purchase units across a region	100	27	
			100		
Price	30	Deliver clinical and PH	25	Region B & E	
		Ability to deliver as sole provider	15	Region	
		Price per FTE	60	Region D & G	
			100		

Minimum Standards	Which criteria does it relate to above?	What question number is it?	What is the Minimum Standard?
	Adequate insurance	13	Have or will obtain insurance to cover any liabilities that may arise
	Confidentiality issues	15	Clear and justified logic for holding any information as confidential
	Client confidentiality	16	Arrangements in place to ensure client confidentiality