



Probity Report

Probity Audit of Procurement and Contract Solutions Relating to the Daintree River Ferry Service

Name of Client: Douglas Shire Council

Date: 30 September 2021

Project Ref: LB6269

Client Ref: Contract No 2021-064

Probity Auditors: John J Lee assisted by Wendy Harris



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1 INTRODUCTION

On 2 July 2021 Local Buy Probity was engaged via a competitive procurement process by Douglas Shire Council (DSC) under the Terms and Conditions of Contract 2021–064 to conduct an independent probity audit. The scope of the probity audit related to a review of the decisions of Council in relation to its overall Daintree River ferry strategy with respect to its short, medium and longer-term procurement and contract solutions. The appointment process followed a Council resolution on 28 May 21 directing the Chief Executive Officer (CEO) to engage a probity auditor through the Audit Committee Chair.

During the engagement start-up meeting it was confirmed and clarified that being a probity audit, the focus of the engagement would be on process and that the engagement was not a financial, legal or forensic audit.

Fundamentally probity involves proactively demonstrating that a procurement process is robust and is beyond reproach. The key probity principles are:

- Independence
- Equity
- Transparency
- Accountability
- Confidentiality
- Security

2 BACKGROUND

The Daintree River Ferry Service is a piece of critical transport infrastructure that provides access to the area north of the Daintree River to residents and tourists. Under a 2005/06 contract, the service was provided by Sirron Enterprises Pty Ltd (Sirron). In recognition of the contract's expiry on 30 June 2021, Council conducted a procurement process for a replacement service, the planning for which commenced in 2018. This culminated in a Council decision on 3 December 2019 to, "enter into contract 2019-084 Daintree River Ferry Contract with Sirron Enterprises (Qld) Pty Ltd" and further authorised, "the CEO to negotiate, finalise and execute any and all matters associated with the contract".

The contract was not executed prior to the March 2020 Council elections (it should be noted that even had the contract been executed prior to the caretaker period, it would not have commenced until 1 July 2021). Following the elections, the newly constituted Council resolved to suspend negotiations and conduct a further round of community consultation. Negotiations with Sirron recommenced in September 2020 with respect to the future two-ferry contract and/or extension of the current contract. When negotiations were unsuccessful, Council resolved to purchase the existing ferry from Sirron and invite tenders for an interim ferry service from 1 July 2021 until a long-term solution was put in place. Entrada was the successful tenderer to provide the interim ferry service.

3 SUMMARY OPINION

The focus of the Probity Audit was on the procurement and contracting processes applied by the DSC in respect of the overall Daintree River ferry service strategy. This included examining Council's approach and solutions to its immediate, interim and longer-term requirements (the project). The project included consideration of a two-ferry option which is yet to be finalised. The position on 1 July 2021 was that Council had acquired ownership of the current ferry and had entered into a five-year operating contract with a service provider. The second ferry option is to be considered further.

The audit commenced with a review of the early planning and strategy development that began in 2018. The methodology adopted included interviewing the major stakeholders (The Mayor, elected representatives, CEO and council officers). It involved developing and reviewing a procurement timeline of events. It included examining the composition and operation of the Project Control Group, the ELT, reviewing Council meeting reports and minutes, reviewing specifications, tender documents, tender processes, tender submissions, negotiation records, reports and contracts. The methodology included examining the various procurement related decisions that were taken and the supporting documents behind those decisions

The approach taken was then to break the project down into the following logical segments:

- The Council decision to enter into a contract on 3 December 2019;
- The Decision to halt negotiations;
- The Council Decision to purchase the existing ferry and award interim ferry operations contract.

Based upon the work undertaken, I have formed the following opinion:

The project was well managed through a Project Control Group (PCG) that included the CEO and appropriately qualified and expert council officers. It was effectively co-chaired by the Project Manager and the CEO. The level of expertise was maintained throughout the project notwithstanding the departure and replacement "mid-term" of the Project Manager.

The process leading up to the decision of Council on 3 December 2019 was compliant with the regulations and well managed having regard to the known circumstances at that time. The earlier strategy to commence with an EOI process was fundamentally a market sounding exercise that was also conducted with the intention of establishing whether an early contractor involvement strategy could be adopted. The decision to then go to open tender was appropriate as was the decision to engage a law firm to protect Council's interests. However, there were complex contractual issues that had still not been resolved when the Local Government elections were called on 22 February 2020 and the contract was put on hold. The CEO made this decision in good faith on legal advice.

After the election, negotiations remained on hold to allow further community consultation. Further options were developed by Council during this time. Formal negotiations recommenced later in 2020 ultimately failed and led to the position at 1 July 2021 as described above.

The actions taken and processes applied throughout the entire process were consistent with the Local Government Regulation and the Local Government Act and were conducted competently and

professionally and in Council's best interests. Decisions were supported by financial modelling and Council's decision to buy the ferry has guaranteed an uninterrupted service.

The various tendering, evaluation and selection, negotiation and contract-execution environments were characterised by confidentiality, security, objectivity, independence and fairness and were conducted ethically and with transparency and integrity. Council is now in a strong position to move forward with its second ferry strategy.

4 ENGAGEMENT SCOPE

The agreed scope of the Probity Audit on the Daintree River Ferry procurement process was set out in Local Buy's response of 23 June 2021 to DSC's Request for Quote (RFQ) dated 11 June 2021. The specified requirement called for a probity audit of Council's procurement processes relating to its overall ferry service strategy, its short, medium and longer-term procurement and contract solutions, ferry ownership and ferry operations.

The engagement was carried out in accordance with recognised probity audit processes. Specific attention was given to the scoping and approach to the Daintree River Ferry contract and tenders, and the subsequent decisions regarding the purchase of the vessel and award of the operating contract. The scope of the engagement included:

- Conducting a preliminary on-site environmental scan and pre-start visit including the identification and interviewing of key stakeholders, leading to the preparation of a bespoke probity approach. This required developing an activity timeline that identified the key milestones (commencing in 2018) and the major activities against which the audit would be conducted (**Attachment A**). Progress was then reviewed during weekly update and progress meetings between DSC and Local Buy.
- Reviewing the Procurement Strategy and related plans, including evaluation plans and methodologies, the composition and operation of the Evaluation Team (ET) and Project Control Group (PCG), evaluation criteria and weightings, the scoring methodology, probity and accountability controls, legislative compliance, timeframes and governance and reporting and communication.
- Reviewing Council's Procurement Policy and Tendering Procedure and other relevant procedures and guidelines.
- Reviewing stakeholder/supplier briefing material.
- Reviewing invitation to offer and tender documents and sighting, confidentiality, privacy and conflict of interest deeds/declarations from the ET panel members, Steering/Advisory Group participants and specialist advisors.
- Reviewing addenda, requests for clarification and clarification responses. Reviewing records of moderation and clarification meetings.
- Reading tender submissions and supporting documentation and consolidated score sheets.
- Reviewing negotiation strategies and activities and all email and formal correspondence relating to negotiations including correspondence with and between legal advisors and progressively amended draft contracts.
- Reviewing executed contract documents.

- Engaging with stakeholders and participants.
- Providing ad-hoc formal and informal feedback during the engagement.
- Noting the results, impact and treatment of financial assessment provided by DSC Team Leader Management Accounting.
- Reviewing available PCG, ET and Council minutes.
- Reviewing records of debriefs to unsuccessful tenderers and unsuccessful proponent responses thereto.
- Providing written probity reports (both confidential and abbreviated/redacted reports at the conclusion of the engagement and less formal advice as required).

The Probity Audit services were provided by John J Lee, Senior Probity Specialist, Local Buy with support from Wendy Harris, Senior Probity Specialist, Local Buy.

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Note: A comprehensive schedule of the key activities and documentation provided to, and by, the Local Buy Probity Advisor is set out in **Attachment A** to this Report.

5 PROBITY AUDITOR INDEPENDENCE

As the external Probity Auditor, I, John J Lee, am not an employee of Douglas Shire Council and do not personally perform any work for any of the parties who submitted a response to Council's Expression of Interest invitation or subsequent Invitations to Offer

I have had no contact (other than contact as part of this process and in a professional capacity as a Local Buy employee) with any of the bidding organisations before or during the course of this process. Furthermore, I am not aware of any family members having any relationship with any of the bidding organisations, the Douglas Shire Council or Douglas Shire Council advisors which could give rise to a real or perceived conflict of interest.

6 LEGISLATIVE AND POLICY CONTEXT

DSC operates within the legislative framework established by the *Local Government Act 2009 (Qld)* (the 'Act') and the *Local Government Regulation 2012 (Qld)* (the 'Regulation'). Beyond the procurement provisions of the Act and Regulation, Council is bound by the local government principles set out in s.4 (2) of the Act which require:

(a) transparent and effective processes, and decision-making in the public interest; and

(e) ethical and legal behaviour of councillors, local government employees and councillor advisors.

Pursuant to s.13 of the Act, local government employees also have the following responsibilities which are relevant to a procurement process:

13(2) All employees have the following responsibilities:

- (b) Carrying out their duties in a way that ensures the local government-*
 - i. discharges its responsibilities under this Act; and*
 - ii. complies with all laws that apply to local governments;*

(c) Providing sound and impartial advice to the local government.

(d) Carrying out their duties impartially and with integrity.

(h) Observing the ethics principles under the Public Sector Ethics Act 1994, section 4.

(i) Complying with a code of conduct under the Public Sector Ethics Act 1994.

Finally, ss.199 and 200 of the Act should be noted. Section 199 of the Act deals with improper conduct and Section 200 with improper use of information by local government employees. A "local government employee" is defined in these sections to include "a contractor of the local government" (similar provisions also apply to councillors and councillor advisors).

A local government employee will be in breach of these sections if they:

- accept a fee or other benefit for doing something as a local government employee.*
- unlawfully destroy or damage local government property.*
- use information acquired as a local government employee to gain an advantage for themselves or someone else or to cause detriment to the local government; or*
- release information that is confidential to the local government.*

The penalty for a breach of either s.199 or 200 is a maximum of 100 penalty units or 2 years imprisonment.

Also relevant are the Douglas Shire Council's suite of policies and procedures, its delegation framework and governance structures, the details of which are posted on Council's intranet and external web site.

DSC requires that all procurement and related processes are conducted in a fair and impartial manner and with the utmost integrity, hence Local Buy Probity's appointment on this occasion as its independent Probity Auditor.

While not directly applicable to Queensland local governments, the Queensland Procurement Policy 2021, which requires that high standards of public sector probity be maintained, is also relevant in

terms of its guidance. Public sector probity requires that processes include:

Independence	All participants be free of conflict of interest.
Transparency	Protocols and processes display transparency to enable confidence in the fairness of the process. This generally requires processes with open and effective competition.
Equity	Requires a level playing field for all interested parties. The key issue is generally ensuring that all receive the same access to information.
Confidentially	All parties keep information confidential.
Security	Requires that tender documentation and information be secured.
Accountability	Requires that all participants must be accountable and document the rationale for decisions.

7 REPORT

7.1 Procurement Framework

The *Local Government Act 2009 (Qld)* (the 'Act') and the *Local Government Regulation 2012 (Qld)* (the 'Regulation') set out the requirements that DSC's procurement processes must comply with. In particular, s.228 of the Regulation details the council's obligations in relation to EOI and Tender processes. Section 228 states (as at 27/09/21):

"228 Tender process

- (1) This section is about how a local government must invite written tenders for—
 - (a) a large-sized contractual arrangement; or
 - (b) a valuable non-current asset contract.
- (2) The local government must either—
 - (a) invite written tenders under subsection (4); or
 - (b) invite expressions of interest under subsection (5) before considering whether to invite written tenders under subsection (7)(b).
- (3) However, the local government may invite expressions of interest under subsection (5) only if the local government—
 - (a) decides, by resolution, that it would be in the public interest to invite expressions of interest before inviting written tenders; and
 - (b) records its reasons for making the resolution in the minutes of the meeting at which the resolution was made.
- (4) The invitation for tenders must—
 - (a) be published on the local government's website for at least 21 days; and
 - (b) allow written tenders to be given to the local government while the invitation is published on the website.
- (5) The invitation for expressions of interest must—
 - (a) be published on the local government's website for at least 21 days; and

- (b) allow written expressions of interest to be given to the local government while the invitation is published on the website.*
- (6) Also, the local government must take all reasonable steps to publish the invitation for tenders or invitation for expressions of interest in another way to notify the public about the tender process.*
- Examples for subsection (6)—publishing an invitation in an industry publication or on the QTENDERS website*
- (7) If the local government invites expressions of interest under subsection (5) or (6), the local government may—*
- (a) prepare a short list from the persons who respond to the invitation for expressions of interest; and*
 - (b) invite written tenders from those persons.*
- (8) If—(a) an invitation to tender under subsection (4) or (7)(b) states that the local government might later invite all tenderers to change their tenders to take account of a change in the tender specifications; and*
- (b) the local government does change the tender specifications;*
- the local government may invite all the persons who submitted a tender to change their tender to take account of the change, before making a decision on the tenders.*
- (9) A local government may decide not to accept any tenders it receives.*
- (10) However, if the local government does decide to accept a tender, the local government must accept the tender most advantageous to it, having regard to the sound contracting principles.”*

7.2 Preliminary Planning

Central to this procurement activity was the establishment of a Project Control Group (PCG). The PCG was made up of the CEO, Executive Manager Financial Infrastructure, CFO, Team Leader Management Infrastructure, Team Leader Management Accounting, Asset Management Officer, Senior Procurement Officer, Senior Communications Officer, Coordinator Frontline & Integrated Services, EA to CEO and WGC Lawyers (Partner and Assigned Legal Counsel) and other specialist advisors and subject matter experts as required. All executed “Acknowledgement of Obligations & Confidentiality” declarations. The PCG was created via the Daintree River Procurement Plan (21 Feb 2019) and a Master Probity Plan was also prepared.

The initial Chair of the PCG, until his departure mid-2020, was the Executive Manager Infrastructure. He was replaced as Chair by the Asset Management Officer. The Chair was responsible for leading proceedings, facilitating the decision process and recording outcomes.

MS Project was selected as the project management application and a project timeline/schedule was established early in the project.

Of note are the roles of the Senior Procurement Officer as internal probity advisor and that of WGC Lawyers providing external probity oversight.

It was during this phase that a significant report by the Queensland Ombudsman into the Douglas Shire Council’s tender and related issues with respect to the 2006 ferry procurement process was introduced. The events of 2006 and the findings and recommendations of the Ombudsman’s report

were seen as particularly relevant to the most recent exercise and were a consideration at all PCG meetings.

Council also recognised the complex and high-risk nature of the project and implemented two mitigation strategies from the outset. WGC Lawyers were engaged to provide legal advice, external probity oversight and negotiation support and in this regard, negotiation primarily occurred lawyer-to-lawyer. The second mitigation strategy was to establish a risk register and proactively manage risk through the PCG.

7.3 Report of the Queensland Ombudsman, The Daintree River Ferry Report, December 2006

In December 2006, the Queensland Ombudsman published its report into the tender process and other issues relating to the DSC's administrative actions in 2005 in awarding a contract for the operation of the Daintree River ferry to commence on 1 July 2006.

For the purposes of this probity audit, the Ombudsman report is relevant in a number of respects:

- The Ombudsman's report was included as a standing item in the Project Control Group (PCG) with the requirement that, "all PCG members familiarise themselves with the findings of this report."
- The implementation of procedural recommendations from the Ombudsman's report, particularly as they relate to procurement and communication with councillors.

Recommendations in relation to future procurements conducted by DSC and relevant to this Report were:

- Recommendation 4 - DSC review its strategic and operational documents and systems to ensure that the CEO and General Managers have a clear understanding of their responsibilities for the efficient conduct of important infrastructure tenders, such as the Daintree ferry tender.
- Recommendation 20 - DSC develop and implement procedures to be incorporated into its Procurement Manual for the planning and procurement of significant purchases of goods and services.

The above recommendations were taken on board as evidenced by the creation and composition of the PCG (in particular the inclusion of the CEO and senior DSC executives), the focus on probity and the strategic approach that was undertaken (as evidenced by Daintree River Procurement Plan and the Master Probity Plan).

The recommendation in relation to communication with Councillors was:

- Recommendation 14 - DSC continue to conduct briefing sessions on major issues (in accordance with recommendation 2 of the Orion Report of June 2005) separate from its deliberative and decision-making functions undertaken at its public meetings.

7.4 Probity Audit Methodology

The audit commenced with a review of the PCG meeting minutes and pre-tender documentation. The Probity Auditor then spent time onsite in Mossman to conduct interviews with the Mayor, the Elected Representatives, the CEO and Council Officers. The Mossman visit was preceded by a meeting with WGC lawyers in Cairns and was followed by the progressive development of an activity timeline covering the period 2018 to 30 June 2021 (**Attachment A**) after which the main decisions were reviewed and the audit approach was determined. The collection and assembly of relevant documentation by the DSC Manager Governance was a significant and complicated task. Documents were progressively loaded onto a DSC OneDrive folder up until 22 August 2021 and the Probity Auditors were given secure, on-line access to the folder.

Stakeholder interviews also raised a number of issues for consideration. While the majority of discussions were positive, there were some significant differences in the views of councillors. The most relevant concerns raised are discussed later in the report.

The approach taken by the Probity Auditor next involved breaking the task down into the following logical segments:

- The Council decision to enter into a contract on 3 December 2019;
- The Decision to halt negotiations;
- The Council Decision to purchase the existing ferry and award interim ferry operations contract; and
- Next steps.

7.5 The Council decision to enter into a contract on 3 December 2019

As noted above, procurement planning commenced during 2018 with the development of a procurement plan, a master probity plan and the formation of the PCG and the ET. An expression of interest (EOI) was undertaken pursuant to s228 of the *Local Government Regulation 2012* (the Regulation). The purpose of the EOI was to establish the potential for following an early market engagement strategy and did not commit to a shortlisting process. The EOI attracted five responses but was ultimately terminated. Council then proceeded with an open market tender process.

The EOI and ITO processes were compliant with the Regulation. The EOI and ITO processes were thorough with the entire process managed by conscientious and competent council officers and professional consultants.

The ITO was advertised on 10 July 2019 and closed on 28 August 2019 (after an extension). Four of the respondents to the EOI were the only respondents to the tender (ITO) invitation. Sirron offered ■■■ tender options. Tenders were evaluated by an Evaluation Team (ET) made up of the Project Manager, the Asset Management Officer, the Team Leader Management Accounting and the Coordinator

Frontline and Integrated Services. The tender evaluation process led to the selection of Sirron's option-█, two-ferry tender as the preferred tender.

From at least mid-November, negotiations had started with the preferred tenderer, Sirron in an attempt to meet project timelines. In the PCG minutes of 21/11/19, the program work under tracking refers to, "Post tender negotiations/meeting held with the preferred tenderer".

The Evaluation Report was considered by Council on 3 December 2019 when it resolved to "enter into contract 2019-084 with Sirron and delegated authority to the CEO to negotiate, finalise and execute any and all matters associated with the contract. A copy of the evaluation report is at **Attachment B**.

The resolution passed by Council on 3 December 2019 was as follows:

"Council resolves to:

1. enter into contract 2019 - 084 Daintree River Ferry Contract 2021 with Sirron Enterprises (Qld) Pty Ltd, ABN: 36 325 937 550;
2. delegates authority under section 257 of the *Local Government Act 2009* to the Chief Executive Officer to negotiate, finalise and execute any and all matters associated with the contract; and
3. allocates \$250,000 from the Daintree River Reserve for the design of the landside infrastructure in preparation for the new service in 2021".

Unfortunately, the wording of the resolution was somewhat confusing in that it implied that the contract was largely completed and ready to be executed but this was not the case.

7.6 The Draft Contracts

The following draft contracts were reviewed: 15/11/19; 3/12/19; 28/1/20; 11/2/20. As at the commencement of the caretaker period on 22 February 2020, the contract had not been finalised and executed.

An analysis of the development of the draft contracts shows that by 3 December 2019 when the Council resolution was made, the main contractual terms had largely been agreed. However, the Schedules, which included details such as pricing, KPIs and Council inputs, had not been significantly developed in the contract document. Many of those Schedule details were in the tender submission and were to be negotiated from that position.

For example, Schedule 7 Pricing states, "to be developed by the parties" and Schedule 10 KPIs has a note, "That the tenderers should include their proposed KPIs with their tender and the Council is open to negotiation on the KPIs".

It was also noted on reviewing the ITO that it was envisaged that specifications including the Schedule of Price would be revised as the contract developed (see Drafting notes under ITO, Heading Part 2 Offer and Price, page 14).

The 3/12/19 draft contract version compared to the 15/11/19 draft shows development of details in the Schedules, although Schedule 7 *Pricing* and Schedule 10 *KPIs* remained undeveloped. By the 28/1/20 version, there were only a few unresolved issues in the main contract. However, there was further development required in some of the Schedules notably Schedule 4 *Council Works and Inputs* and Schedule 10 *KPIs*. By 11/2/20 most terms in the main contract were settled, and a number of the Schedules were significantly developed, including the Pricing Schedule. However, negotiations on Schedule 10, *the KPIs* had stalled.

A series of emails in late February and early March 2020 show an interest by both Council and Sirron to have the contract signed. The Executive Manager Infrastructure wrote (on 2 March 2020) to the Chief Executive Officer, that he “would like to have them (Sirron) sign off on it later this week or early next week”.

The minutes of the PCG for 5 March 2020 show that there were unresolved issues, particularly regarding Schedule 4 *Council works*, Schedule 7 *Pricing*, and Schedule 11 *KPIs*. As of 5 March 2020, the contract was not in a condition to be signed and it would have required a concentrated effort and compromise for that to be achieved by “early next week”.

The available DSC documents indicate anticipated timelines for finalising the contract after acceptance of the offer:

- PCG minutes dated 3/9/19 indicate for the Project Plan that the GANTT chart progress was on track including, “Allow 2 months for post tender negotiations”.
- PCG minutes dated 8/10/19 indicated that the contract would be signed between 4 and 10 December 2019.
- In the ITO in the section on contracts clause 1.13 there is a note by lawyers WGC for DSC that the validity period for the tenderer’s offer should include “a 3-month buffer for the time intended to make a Contract”.
- In the Probity Plan, the timelines allow 9 weeks for post-offer negotiations.
- In the Evaluation Report under Risk Management Implications, it states, “The PCG has been negotiating the final contract with Sirron and it is planned to have this completed by the end of December 2019. Some of the key issues to be finalised include the Key Performance Indicators, service delivery timeframes and triggers. A high risk to the implementation of the two-ferry solution is the design, permit and approvals and construction of the landside infrastructure by Council. The final contract will be written to enable a phase-in of services when the infrastructure is available”. There is evidence on file that suggests that the required permits would take up to 12 months to obtain and that Sirron had advised that permit approvals were a non-negotiable precondition to entering into a vessel construction contract.

In hindsight, the anticipated timeframes were optimistic given the complexity of the requirement and the commercial realities of negotiating such a complex arrangement. They also failed to consider the impact of the upcoming local government elections.

7.7 The decision to halt negotiations

The *Local Government Act 2009 (Qld)* (ss 90A- 90D) prohibits a local government from making a major

policy decision during the caretaker period; that is from the time there is public notice of the holding of the election through to the conclusion of the election. For the 2020 Queensland local government elections, the caretaker period started on 22 February 2020. Relevantly, a major policy decision includes a decision,

“(d) to enter into a contract the total value of which is more than the greater of the following—

(i) \$200,000;

(ii) 1% of the local government’s net rate and utility charges as stated in the local government’s audited financial statements included in the local government’s most recently adopted annual report” (Schedule 4 Definitions).

The PCG minutes dated 5 March 2020, do not record any discussion of the caretaker period, however the CEO has subsequently stated that it was on this date that he determined that he could not execute the contract because of the caretaker period restrictions. Two representatives of the legal firm advising on the ferry services contract were present at that meeting and provided verbal advice on which the CEO states he acted. He advised Councillors of this decision at the workshop on 21 April 2020 and, upon questioning, the next day obtained written confirmation (by letter dated 22 April 2020) of the verbal legal advice that had been provided.

It is quite possible that the CEO communicated this advice to the Mayor prior to the Councillor’s workshop. While an apparent lack of communication may well have contributed to the disquiet surrounding this phase of the activity, formal recording of the facts in PCG minutes may have facilitated more formal communication.

It is considered that a CEO acting in good faith on competent professional advice, cannot be said to be acting inappropriately.

7.8 Subsequent Mayoral minute and second round of public consultation

An email dated 6 April 2020 from incoming Mayor Michael Kerr to MP Warren Entsch indicates that once formally appointed he would put on hold dealings with the ferry contact until such time as the community could consider all pro’s, cons and financial costs of the available possibilities including the option of a bridge. This was confirmed by the CEO at a workshop held for Councillors on 21 April 2020. The Mayoral Minute included in the Council’s meeting of 28 April 2020 states:

“That Council:

1. Temporarily suspend contract negotiations for contract 2019 – 084 Daintree Ferry Contract 2021 while it:
2. Explores the option of a bridge crossing at various locations and the possible economic benefits to the region;

3. Conducts further community consultation including the bridge option and details of the costs of the two-ferry solution provided for in the currently negotiated contract; and
4. Brings the results of the community consultation back to an Ordinary Council Meeting for further discussion and resolution.”

Planning for an options analysis report and engagement plan commenced from May 2020. Community consultation continued through to late November 2020 with a final report being released to the public and Council on 1 December 2020. On 15 December 2020, Council resolved that:

“Council resume contract negotiations for 2019-084 Daintree Ferry Contract and request that the CEO brings back a report to Councillors with key final terms of the contract for approval prior to signing.”

7.9 Main contract activity (post caretaker period and leading up to 30 June 2021) including negotiations on an interim contract with Sirron

Council was confronted by a number of related practical and legal issues during this time, including the expiry of Sirron’s two-ferry tender and the concern for continuity of the ferry service at least through to the commencement of the new two-ferry contract. **Attachment C** contains a summary of key terms from the 2005-2006 contract that were relevant to the negotiations through-out 2020/21.

From September 2020, Council had commenced negotiations with Sirron for an extension under the 2005-2006 contract with the main point of disagreement being the increased pricing sought by Sirron within the contract’s terms.

By 13 November 2020, Sirron had agreed to extend the time that the Council could accept its Tender for Daintree Ferry Service Contract DSC:2019-084 through to 30 April 2021. However this was subject to Sirron being able to review its tendered price (DSC lawyer’s letter dated 13 November 2020). Note: a few of the Councillors indicated that they were not aware of this new expiry date until May 2021.

A review of the draft contracts shows that in the 1/2/21 draft contract there were substantially more points throughout the contract that were reopened for negotiation than the last version 12 months ago. This could be attributed to new lawyers acting for Sirron from October 2020.

With the uncertainty of negotiations on the two-ferry contract, the Council on 12/1/21 resolved to explore other options including:

- Negotiating an extension of the 2005-2006 contact for a 5 year plus 2-year option contract based on pricing in a Council report.
- Entering into an interim contract to operate the ferry for the period up to the two-ferry contract commencing 1 July 2021 and advising Sirron they could tender for this.
- Entering into negotiations for the purchase of Sirron’s existing ferry pursuant to the 2005-2006 contract.

Further, during April 2021, the Council requested the Minister to exercise their discretion under the *Transport Operations (Passenger Transport) Act 1994* (Qld) to declare the ferry was an “essential public transport infrastructure”, enabling the Council to undertake a process to compulsorily use the vessel. The Minister did not agree to this request.

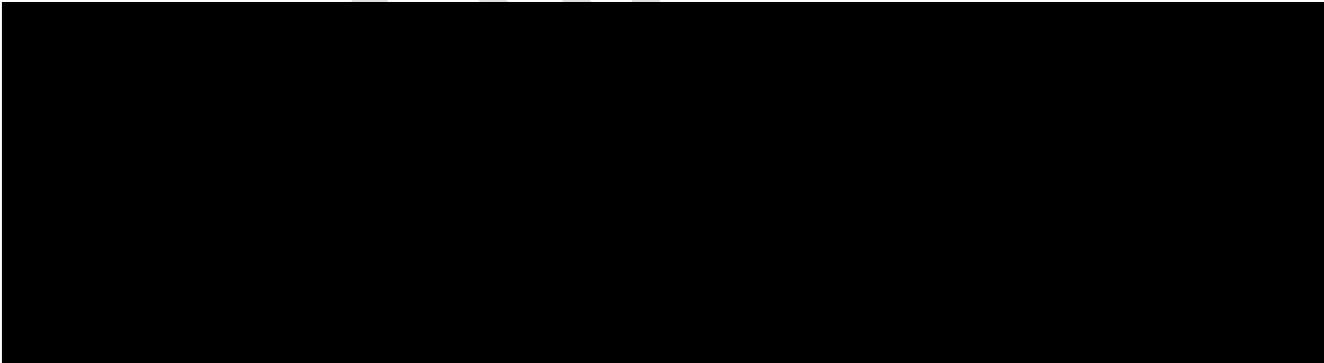
Negotiations on the second ferry construction continued through to 30 April 2021 when the tender validity period expired and the offer lapsed. However, as discussed later, this has arguably worked to Council’s advantage.

7.10 Council Decision to purchase the existing ferry and award an interim ferry operations contract

By February 2021 it had become increasingly clear that the parties were unlikely to conclude the two-ferry contract (and service extension option) with Sirron and in March, the parties entered into sale/purchase negotiations under the provisions of the existing contract (see **Attachment C**). Council had obtained valuations with respect to a possible ferry purchase and the Project Manager had conducted and made an offer of \$820 000 to purchase the ferry or enter into a lease option for an interim contract period. It also participated in a workshop with Sirron to resolve issues.

Concurrently with this, Council issued a tender for an interim five-year ferry service operator in February 2021, which is discussed further below.

Sirron had asked for an extension of time beyond the lodgement date for its two-ferry offer. This was granted.



On 17 May 21 Council decided that after a review of available options and the short timeframe until the expiry of the Sirron 2005-2006 contract, it had little choice but to purchase the ferry if it was to provide an uninterrupted service to some 700 residents who lived north of the river and to “*tens of thousands of annual visitors*”.

The sale/purchase transaction was negotiated under the 2005 - 2006 contract. Clause 14.1 (under the heading *Contractor to negotiate lease of vessel*) requires the Contractor to enter into “good faith” negotiations with DSC to sell the vessel, where DSC makes a written request at least 3 months prior to the expiry date. The sale if any would be effective from the expiry date. There are no provisions for determining the sale price.

The sale price offered was significantly higher than the marine valuers' assessments. However the process followed was appropriate and delivered value to Council. By way of example:

The Project Manager had, in addition to the earlier EOI and tender processes:

- conducted an internet search of Ship Agents lists for similar vessel some of which were Europe based. (without success);
- contacted previous tenderers for the initial 2021 Ferry Service Tender from 2019 of which all three provided a form of solution which were not acceptable;
- considered British Columbia ferries as a late option but it was understood a ferry from outside Australia would require an AMSA survey to be completed with input from a Marine Engineer, estimated to take at least three months after ferry arrival in Australia; and
- held discussions with local shipbuilder on the timeframe to produce a new ferry, estimated at 12 months, if space was available to start.

The Project Manager (with the CEO's knowledge) also explored a second-hand barge solution which while on the surface was a little cheaper than buying the existing ferry, presented significant risks in terms of suitability, seaworthiness and price and in any event, would have resulted in a three-month interruption to service.

With respect to price, a comprehensive financial analysis and comparison of the two available options was prepared by the Team Leader Management Accounting and is included as **Attachment D** to this report. The modelling supports the decision to buy the ferry and engage an operator to run the service. By way of a further observation, the transaction price would likely include a component for goodwill and the economic loss to the region would have been significant were the service severely interrupted. The decision to purchase the ferry in conjunction with the negotiation of an interim operating agreement has delivered a further benefit to Council. It has placed Council in a far stronger negotiation position when it comes to negotiating the second ferry purchase.

Having regard to the circumstances, the purchase process was sound and compliant contractually and was properly conducted in terms of process. The purchase approach also guaranteed the continuation of the ferry service from the date of expiry of the 2005/06 contract.

7.11 Interim Ferry Service Operator

During February 2021, Council invited tenders for a service operator to deliver the Daintree River Ferry service. The tender provided for options to be submitted that were based upon whether the Council or the operator owned the ferry. Council received two tenders, both of which were evaluated in accordance with the conditions of tender and the tender evaluation plan. The ET was made up of the Project Manager, Manager Infrastructure Services, Team Leader Management Accounting, Coordinator Frontline and Integrated Services and Senior Procurement Officer (Probity).

Tenders were received from Divers Den Investments (Entrada Travel Group) an experienced operator and [REDACTED]. The contract is based upon multiple increments of up to five years to allow flexibility. Both tenders provided conforming offers and both were assessed by the ET. The contract was awarded to Divers Den who scored significantly higher than [REDACTED] with respect to its service model, capability and capacity, environmental sustainability and cost.

Based upon my review of documentation (including the evaluation report) and discussions with the Senior Procurement Officer, I have concluded that the process was conducted in accordance with the *Local Government Regulation 2012* (Qld) and DSC's policies and protocols were consistently and fairly executed with respect to both tenderers.

7.12 Matters Raised During Interviews

A number of matters were raised during the entry interviews that require comment. While most comments were positive, some were critical and have been at the forefront of the Probity Auditor's mind as the audit progressed. However, as advised to all parties from the beginning of the engagement, a Probity Audit is fundamentally a procurement and contracting process review and while it would be appropriate to consider procurement related concerns and compliance with relevant clauses in *Local Government Regulation 2012* (Qld) and the *Local Government Act 2009* and Council policies and procedures, it is neither a forensic nor a financial audit. Some matters raised, while being of genuine concern to the party raising the matter, fall outside the scope of the audit.

The most relevant of the critical and concerning comments were as follows:

- **Concern:** The difficult nature of the negotiations which became commercially difficult and uncompromising as they progressed.
Response: This is commercial reality. It is important for organisations to have access to skilled negotiators. On this occasion, Sirron was in the more powerful negotiating position. However, Council was still able to negotiate advantageous outcomes and maintain continuity of service.
- **Concern:** The length of the total procurement process and the impact of the caretaker period.
Response: The process did take longer than anticipated largely due to the two rounds of community consultation, the impact of the local government elections and the complicated and protracted negotiations on multiple fronts.
- **Concern:** The lead time involved obtaining permits.
Response: The administrative lead time in obtaining such permits is uncertain and can be lengthy. This needs to be factored into planning.
- **Concern:** Risk had not been well managed.

Response: The specific risk register that had been established in relation to the project was a comprehensive document and risk was proactively managed through the PCG.

- **Concern:** Information and legal advice was either not communicated to councillors in a timely manner or not at all.

Response: Legal advice is normally an operational issue. However it can be appropriate to brief elected representatives, subject to commercial confidentiality.

- **Concern:** Elected representatives had not been kept informed of critical matters associated with the implementation of Council Resolution of 3 December 2019.

Response: The CEO is understood to have regularly briefed the Mayor on developments.

Recommendation: Council to review its communication protocols.

- **Concern:** The decision to award an interim contract to Entrada.

Response: As outlined above, the process was conducted in accordance with the *Local Government Regulation 2012* (Qld) and DSC's policies and protocols were consistently and fairly applied.

- **Comment:** There was a view that had contract 2019 – 084 been signed prior to caretaker period, the second ferry would be up and running.

Response: This is speculative and may or may not have been the case. There were permit, design and manufacturing lead times involved.

8 OPINION

8.1 Findings

Activity Pre 2020 Local Government Elections

From a project management perspective, the project was well planned and managed via the PCG. Schedules, the project timeline and events were managed via MS Project and events were managed via a MS Project and risk through a comprehensive risk register. In addition, the recommendations of a Queensland Ombudsmen following its review of a previous ferry procurement process were taken up. However, various events, many of which were beyond the control of the project manager and unpredictable issues that impinged upon the achievement of planned strategies and the initial timelines.

The process leading up to the decision of Council on 3 December was compliant with the regulations and well managed having regard to the known circumstances at that time. The strategy to commence with an EOI process was fundamentally a market sounding exercise that was also conducted with the intention of establishing whether an early contractor involvement strategy could be adopted. Having regard to the EOI responses, the decision to then go to open tender was also appropriate as was the decision to engage WGC Lawyers to protect Council's interests. While the timing of the Council decision to award a contract met the project timeline, there were somewhat complex contractual

issues that had still not been resolved when this decision was taken and which proved problematic moving forward.

Unfortunately, the wording of the resolution was somewhat confusing in that it implied that the contract was largely completed and ready to be executed. However, this was not the case and subsequent negotiations around important clauses including key performance indicators and pricing were complex. Negotiations continued through to the Government's calling of Local Government elections on 22 February 2020 when the caretaker period commenced and restrictions on the ability of Councils to enter into contracts came into force.

There has been disquiet in some quarters on the CEO's action to suspend negotiations and halt the procurement process. However, in my opinion, the CEO acted in good faith and with the right intentions on competent professional advice. Furthermore, there is documentary evidence on file that confirms that all parties were conscientiously attempting to conclude discussions and execute the contract.

There has been a suggestion that there may have been attempts to frustrate or delay the finalisation and execution of the contract. I found no evidence of this.

The main lesson that can be taken at this point is that even with what appears to be a generous timeframe to complete the engagement, if there are more effective ways than an EOI to conduct market research, these should be considered.

Post Council Elections

A number of comments have been made regarding communications between elected officials and government ministers and on the timing of announcements up to and during the election, including pre-election advice that the public might be consulted once more on a ferry vs bridge option.

Whether this affected the election result is not relevant to this probity audit. However, I found no evidence of any probity breaches in respect of this or any other procurement process.

Shortly after the election, the new Mayor announced his intention to enter into a further round of community consultation. Contract negotiations were suspended and community consultation commenced. Planning for an options analysis report and engagement plan commenced in May 2020 and discussions with Sirron on a possible contract extension commenced in September 2020. Formal contract negotiations on the two-ferry option recommenced in December 2020. Negotiations from this point became increasingly difficult (commercially) and uncompromising. The Council commenced contingency planning while still actively negotiating with Sirron on the two-ferry proposal and an interim ferry operations contract.

These discussions ultimately failed and were terminated.

The tender to conduct a two-ferry service including, constructing a second ferry lapsed. Sirron's offer to extend the (then) current contract was not commercially or financially acceptable and contained a requirement that Council commit to purchase a second ferry. This related to a lapsed tender offer and had conditions which could have exposed Council commercially. Council negotiated to buy the

existing ferry and entered into an “up to” five-year contract with a ferry service operator as discussed earlier.

In terms of findings, I found throughout that the processes described in this report were consistent with the Regulation and the Act and were conducted competently and professionally and in Council’s best interests. Council’s negotiating position was quite difficult having regard to vessel availability in Australia and overseas. The financial modelling at **Attachment D** indicates that the decision to purchase the ferry and engage a ferry operator to run the service stacks up commercially against the Sirron’s interim offer (the only alternative) and the decision to do so followed proper analysis and was based upon the facts, including the negotiated price reduction. Council’s decision to buy the ferry has guaranteed an uninterrupted service to some 700 residents who lived north of the river and to “tens of thousands of annual visitors”.

8.2 Matters for Noting

Had there been a formula in the existing contract to determine the sale price of the vessel to Council, the sale/purchase transaction may have been concluded earlier and with a different outcome. Any future contract with a ferry/owner operator that includes a purchase option should include a formula to calculate the purchase price.

Project timelines were altered by external events and a change in the Council composition. When establishing a project timeline, key external events should be factored in eg, forthcoming local government elections.

Council is now in a far stronger position to negotiate a contract for the construction of a second ferry. It will also have an opportunity to develop realistic and achievable alternative strategies prior to the commencement of negotiations. This would have the effect of not only improving its prospects at the negotiating table but also would give Council a real alternative.

The negotiations were possibly complicated by the use of standard conditions of contract. Council engaged professional legal advice and the Council Officers engaged in the process were professional and competent. However in an engagement such as this, using a bespoke contract standard from the beginning may have reduced the negotiation time.

With respect to the matters raised during the interviews, the fact the Elected Representatives were not kept up to date needs to be addressed. This may be systemic, and Council should review its communication protocols including increased use of briefing sessions at critical times.

Unfortunately, the wording of the resolution was somewhat confusing in that it implied that the contract was largely completed and ready to be executed but this was not the case.

The procurement and evaluation methodology, while being somewhat protracted due to the complexity of the requirement and the commercial realities of negotiating such a complex arrangement was fundamentally sound. Possibly, with the benefit of hindsight, the initial market research/EOI process may have been shortened.

8.3 Next Steps

Council has an opportunity to considerably improve its strategy and negotiating position with respect to the second ferry purchase. It has the opportunity to conduct more comprehensive market research and consider how it might move from a concept design to an engineering solution. It has the opportunity to secure essential permits in advance of market engagement and it has an opportunity to acquire appropriate negotiation capability. It has the opportunity to shore up its position by developing realistic and acceptable fall-back strategies.

9 CONCLUSION

Based on the work undertaken as outlined in this report, I advise that in my opinion, the process undertaken and the decisions of Council in relation to its overall Daintree River ferry strategy and procurement and contract solutions were performed in accordance with strategies approved by Council, the master probity plan and the various relevant Council resolutions. Project management was highly effective in coping with major disruptions to project timelines and achieved the required outcome, namely on-going and uninterrupted service.

Based on my observations, review of documentation and discussions with stakeholders, I have concluded that the various tendering, evaluation and selection, negotiation and contract-execution environments were characterised by confidentiality, security, objectivity, independence and fairness and were conducted ethically and with transparency and integrity.

The process, while being somewhat protracted due to the complexities encountered, the commercial realities of negotiating such complex arrangements and achieving positive and advantageous outcomes in the face of external and unforeseen delays, was sound and effective.

Notwithstanding the delays, there was still time to negotiate an outcome were it not for the negotiating strategy of the seller. Nevertheless, the final outcome was arguably successful notwithstanding the price paid for the ferry. Council entered into the purchase arrangement in possession of all of the facts that stacked-up against the only available alternative option at the time if it was to secure uninterrupted access north of the Daintree River and this it achieved. It is also now in a far stronger negotiating position moving forward.

Below are a number of improvement recommendations for Council's consideration:

Recommendations:

The recommendations are that:

- Council reviews its communication protocols.
- Council continues to conduct closed and possibly informal briefing sessions on major issues separate from its deliberative and decision-making functions and review the frequency of such sessions and possibly hold more frequent in-house briefing sessions for all councillors on major issues and forthcoming reports.

- Any future contract with a ferry/owner operator that includes a purchase option should include a formula to calculate the purchase price.
- Council considers alternative methods of conducting preliminary and market research in advance of a major procurement activity.
- Council establishes a negotiation protocol, methodology and policy and train selected personnel in negotiation.
- In the case of the second ferry contract, Council continues its market research, firms up its requirement and focuses on developing an acquisition strategy that puts the Council into a sound negotiating position before engaging the market.
- Future contract award recommendations describe the status of contract and prerequisites for execution more clearly.
- When establishing project timelines, key external events should be factored in eg: forthcoming local government elections and community influences.



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Probity Auditor

Senior Probity Specialist and Team Lead



Attachment A - Project Timeline

Daintree River Ferry Contract Renewal - Activity Timeline

Date	Activity	Output/ Documentation
2018	DSC Decided to review its requirements and approach in respect of the Daintree River Ferry service. The (then) existing arrangement with Sirron, the ferry owner and operator had been in place for around 12 years and was due to expire mid-2021.	
2019	EOI process	████████ Folder
2019	Extensive Community Consultation led to the release of a report recommending the continuation of a ferry service.	Community engagement feedback June 2019
10 July 2019	Open market ITO issued asking the market for solutions	ITO Contract Spec
19 July 2019	Supplier briefing held at Council Admin and Site Visit.	Power point presentation
August 2019	Tenders closed (Market responses to ITP.) Sirron (Current Supplier) offered █████ Options, including 2 two-ferry solutions. ████████ respondents offered large one-ferry solutions and one offered a two-ferry solution.	ITO Responses (Tenders) Tender Logs
3 Dec 2019	Council selected Sirron "████████", a two-ferry option For further development and negotiation. CEO authorised by Council to negotiate an acceptable arrangement prior to award. Significant effort anticipated. Negotiations commenced between Sirron and Council.	Evaluation Report Recommendation Report Council Resolution WGC revisions to Contract and emails
December 2019	Face-to-face meeting with Sirron. Discussions led to the identification of a 12-month lead time to even commence a process to establish a two-ferry operation.	Report/Minutes?
December 2019 thru March/April 2020	CEO authorised by Council as follows: "Council resolves to: 1. enter into contract 2019 - 084 Daintree River Ferry Contract 2021 with Sirron Enterprises (Qld) Pty Ltd, ABN: 36 325 937 550; 2. delegates authority under section 257 of the Local Government Act 2009 to the Chief Executive Officer to negotiate, finalise and execute any and all matters associated with the contract;" Caretaker period commenced on 22 February 2020 Council election results were declared on 7 April 2020. New Mayor Cr Michael Kerr was elected.	Council Meeting Minutes of 3 December. Recommendation report. WGC Advice to DSC re caretaker period.

April 20	Mayoral Minute directed a halt to negotiations and a further community consultation process that also addressed a possible bridge option.	Council Minutes
May 2020	Planning for a further round of community consultation commenced. Extensive, and included the potential bridge option. The ultimate outcome was to continue with a two-ferry service solution.	Community engagement plan ██████
2 June 2020	Councillor workshop held.	Options analysis report & engagement plan considered.
25 June 20	WGC delivered its report on Sirron's position and legal options paper.	Legal Options Paper
28 July 20	Council Meeting to start discussions to extend Sirron contract for a multiple term for up to 7 years.	Council meeting closed report
4 Aug 20	Option report workshop.	Options Report
25 Aug 20	Options report and Consultation Plan accepted by Council.	CM Minutes 25 Aug 21. Closed session, two separate resolutions.
Sep 20	Discussions commenced with Sirron on an interim 5-year contract extension. Long term 15-year contract still the intention. On 8 September, Council met with Sirron to discuss Contract Offer Extension.	Revised Deed PCG minutes of 10/9/20.
9 Sep 20	Sirron advised they wished to review the price for the extension and added ██████ to the prices of the fixed-price portion of the contract, plus increased commission by ██████. Total contract increase estimated at ██████.	Email
23 Sep 20	Sirron send through their revised price and add modifications to the current contract.	Email
19 Oct 20	Council issues response to Sirron's changes via WGC to BBT (Sirron's lawyers). Asked for justification of price increases.	Email/Letter
23 Oct 20	Request to extend response time from 26 th to 30 th Oct.	Email
30 Oct 20	Sirron change lawyers from ██████ to ██████.	Email
3 Nov 20	Sirron's response on extension changes received.	Email
9 Nov 20	Council through WGC provide response.	Email/Letter
11 Nov 20	Sirron through Lawyer reject offer.	Email/Letter
28 Sep to 5 Nov 20	Community Consultation continued in Port Douglas, Mossman and Diwan.	Feedback reports
Aug to December 2020	Council continued negotiating with Sirron on the contract extension, looked at other options and decided to investigate the feasibility of buying the ferry.	
26 Nov 20	Community consultation survey results Workshop.	Community survey results

Nov 20	Alternative Options further developed. Scenarios sent to WGP.	PCG Minutes ██████████
1 Dec 20	Final Report on Community Consultation released (to the public and Council simultaneously).	CM Agenda 5.1 15 Dec 20 Council Meeting
15 Dec 20	Consultation report considered by Council. Council resolved as follows: "That Council resumes contract negotiations for 2019-084 Daintree Ferry Contract 2021 and requests that the CEO bring back a report to Councillors with key final terms of the contract for approval prior to signing."	CM Minutes 15 Dec 20.
12 Jan 21	With respect to the extension of the (then) current with Sirron. Council presented a final offer to Sirron – █████ fixed fee increase and cost plus for dry-docking – Total estimated increase █████. The strategy, if not successful, was to proceed with the interim contract offers from ████████████████████ and offer to purchase the existing ferry.	CM Written Offer
Jan 21	Offer not accepted by Sirron.	
Jan 21	Revised two-ferry contract issued to Sirron. Revision contained variations to contract clauses but no changes to pricing.	Email
Jan/Feb 21	Council: Continued to pursue the "Two ferry Contract" concept with Sirron. Issued an ITO for an interim five-year contract to deal with the possibility that extension negotiations with Sirron might not be successful. Obtained valuations with respect to a possible ferry purchase (\$750,000 and \$900,000).	Workshop minutes. Survey/Valuation Reports
March 21	Council made offer to purchase/lease the ferry from Sirron for ██████████ (to purchase) or enter into lease option to align with interim contract period.	Offer document WGC Letter
March 21	Workshop with Sirron on two-ferry contract to resolve issues.	Workshop minutes and marked up contract
9 March 21	Tenders for interim contract closed. Offers received from ████████████████████. No offer from Sirron. See note 2 below.	Tenders
April 21	Sirron had rejected lease offer. Council still awaiting Sirron response to Council Offer to purchase.	Sirron Offer

April 21	Sirron asked if extension offer was still valid.	
30 April 21	Closed Council Meeting to discuss vessel purchase and/or extension of current service.	Meeting Minutes
5 May 21	Sirron presented 2 offers: * Sell Ferry to Council for [REDACTED]. * [REDACTED] [REDACTED] [REDACTED] [REDACTED].	Email/Letter
13 May 21	Sirron revised purchase offer to [REDACTED] (after negotiations with Council CEO) with the understanding/condition that Council would move to a two-ferry contract.	Email/Letter
17 May 21	Council decides to purchase ferry.	SCM Minutes
20 May 21	Council decides to award interim contract to Divers Den.	SCM Minutes
2 June to 18 June 21	Contract negotiations with Divers Den.	Signed Contract
30 June	Ferry Handover.	Sale Agreement/Bill of Sale
1 July 21	Interim arrangement with Entrada commenced using Council owned ferry.	Contract

Notes:

- 1 [REDACTED].
- 2 [REDACTED]
[REDACTED]
- 3 Special Council Meeting
- 4 DSC Cost comparisons prepared by DSC Team Leader Management Accounting.

Legend

Two-Ferry Contract.

Community Consultation

Sirron Contract Extension/Interim Contract/Ferry Purchase

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Attachment C - Summary of key contractual terms 2005-6 Daintree River Ferry Contract

Summary of key contract terms from the 2005-2006 contract that were relevant to the negotiations through-out 2020/21.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

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