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Auditor-General's overview

E ngā mana, e ngā reo, e ngā karangarangatanga maha o te motu, tēnā koutou.

Callaghan Innovation is a public organisation that supports businesses in the innovation sector. To build capability and accelerate growth in start-ups, Callaghan Innovation has a Founder and Start-up Support programme (the Start-up programme). Through this programme, a panel of providers provide mentoring and training to founders.

Between November 2021 and June 2022, Callaghan Innovation carried out a procurement process to find providers to deliver the Start-up programme.

Integrity of processes is critical in procurement. It is important that public organisations use procurement processes that support public trust and confidence in how public money is spent. The Government Procurement Rules, which Callaghan Innovation must comply with, require agencies to safeguard the integrity of their procurement activities and processes.

My Office was aware of media commentary about Callaghan Innovation's procurement process for the Start-up programme, and Manaaki, one of the tenderers, raised concerns about the due diligence process for the procurement with us.

The concerns were that Callaghan Innovation had not properly managed a conflict of interest, that there was a lack of natural justice,¹ and that Callaghan Innovation had inappropriately shared confidential information with other public organisations.

For these reasons, I decided to inquire into whether Callaghan Innovation's actions and procurement processes for the Start-up programme complied with the principles of good procurement that the public and I expect from public organisations. This inquiry does not comment or form a view on the procurement's outcome.

Callaghan Innovation's Start-up programme procurement

We understand that founders in the innovation sector can sometimes find themselves in vulnerable situations because of the power imbalance between them and more established investors and directors. Some of these founders had previously told Callaghan Innovation about unethical behaviour, including bullying, harassment, and sexism, that they had experienced.

Callaghan Innovation wanted to select providers who would provide a safe environment for founders. Therefore, Callaghan Innovation decided to carry

¹ By natural justice, we mean being procedurally fair, which includes allowing someone the opportunity to comment on the fairness, accuracy, and balance of what has been said about them and/or to identify any errors.

out more intensive due diligence on the shortlisted tenderers for the Start-up programme and hired an external contractor, a private investigator, to do this.

The contractor reported no significant issues with five of the six shortlisted tenderers. However, Callaghan Innovation was concerned about the due diligence findings for one of the tenderers, Manaaki (and its parent company We Are Indigo), and commissioned a second due diligence round. Callaghan Innovation's former Chief Executive said that this was "giving Manaaki the benefit of the doubt". Callaghan Innovation later told Manaaki that it was not successful in the Start-up programme procurement because of the due diligence findings.

Callaghan Innovation shared the due diligence reports about Manaaki with two other public organisations during and after the procurement. The media reported about the procurement and due diligence process while the procurement was ongoing, and redacted copies of the two due diligence reports about Manaaki were provided anonymously to the media and others after Callaghan Innovation had made the procurement decision.

Callaghan Innovation's due diligence process was neither transparent nor fair

Because of the nature of the concerns Callaghan Innovation wanted to address, it was reasonable for Callaghan Innovation to implement a more intensive due diligence process. In doing so, it was important for Callaghan Innovation to set up a process that treated all those involved in the procurement fairly and transparently, as the Procurement Rules require.

Callaghan Innovation did not give enough thought to how it proposed to manage the more detailed information it might get from the due diligence process or what it would do to respond to any significant concerns that the process identified. It did not sufficiently consider precautions to keep information secure or how it could give effect to the principles of natural justice.

The due diligence process was not transparent. We were told that there were concerns about the "optics" of using a private investigator and that a decision was made not to inform tenderers who would carry out the due diligence.

Not disclosing who would carry out the due diligence meant that tenderers could not raise any potential conflicts of interest or risks of bias. This resulted in Callaghan Innovation missing an early opportunity to identify and manage an alleged conflict of interest that Manaaki raised with it later.

In my opinion, there was a lack of natural justice in the due diligence process. Manaaki had a limited opportunity to give its version of events in response to the

first due diligence report and no opportunity to respond to the findings in the second due diligence report.

Callaghan Innovation told us that it decided to exclude Manaaki from the procurement based on allegations of poor behaviour that some of the people interviewed for the due diligence made. Guidance on due diligence for public sector procurement is limited, but I question whether a reasonable observer would find it acceptable to make decisions based on allegations without considering whether those allegations can and should be verified first, regardless of what guidance is available.

I acknowledge that instances of poor behaviour might occur in settings where the behaviour is not witnessed and that it is not uncommon that an individual's testimony of their experience might be the sole source of evidence. However, the due diligence reports included other serious allegations that I consider were capable of being independently verified.

Manaaki does not dispute that the terms of the request for proposal enabled Callaghan Innovation to exclude it from the procurement, but Manaaki does not agree with the basis that the decision was made on. After the procurement, Manaaki raised concerns with Callaghan Innovation about a potential conflict of interest in the due diligence process, information sharing with other agencies, and the leaking of the due diligence reports.

In my view, Callaghan Innovation could have dealt with the concerns Manaaki raised more transparently. An organisation's obligations to act fairly, transparently, and reasonably do not disappear once it has made a procurement decision.

Callaghan Innovation did not properly manage the risk of bias

The contractor who Callaghan Innovation hired to carry out the due diligence had previously worked for a company (Company A) that had a dispute with We Are Indigo (Manaaki's parent company). As a result of that work, the contractor made allegations of fraud against We Are Indigo to the Ministry of Business, Innovation and Employment. The contractor later interviewed Company A as part of the due diligence process, while still subject to a retainer agreement with Company A.

The second due diligence report included an allegation that Manaaki had attempted to misappropriate government funds. This allegation was related to the earlier dispute between Company A and We are Indigo. The contractor told my staff that the allegations set out in the due diligence reports were based on the interviewees' statements. However, my staff could not find evidence that an interviewee made this specific allegation.

We acknowledge that the contractor was not the decision-maker and it was for Callaghan Innovation to decide whether it had sufficient grounds to exclude Manaaki from the procurement. However, the allegation of “attempted misappropriation of government funds” was included in Callaghan Innovation’s final decision document for the Start-up programme procurement. It was also subsequently shared with other government agencies.

Callaghan Innovation was told about the contractor’s previous work with Company A on several occasions. The Ministry of Business, Innovation and Employment told Callaghan Innovation about the contractor’s earlier allegations of fraud and misappropriation against We Are Indigo. Shortly after, Callaghan Innovation commissioned the contractor to do a second round of due diligence on Manaaki.

Callaghan Innovation appears to have relied initially on the contractor’s view that no conflict of interest arose from his previous work because there was no ongoing financial relationship with Company A. Callaghan Innovation said that, because the contractor would be reporting only what people said to him in interviews, his prior experience could not influence the objectivity of his reporting.

However, Callaghan Innovation did not document any of the discussions or considerations about the nature of the contractor’s prior work, its potential risk to the procurement, or mitigation strategies. This is not consistent with good practice, as set out in the Government Procurement Rules and our guidance on conflicts of interest, nor is it consistent with Callaghan Innovation’s policies.

In my view, there was a risk that the contractor came to the engagement with a pre-determined view about Manaaki and its suitability for the Start-up programme. At the very least, the contractor could be perceived to have done so. Callaghan Innovation needed to do more to manage that risk. It did not adequately consider how a perception of bias created by the contractor’s previous work could “taint” the due diligence.

When Manaaki raised concerns that the contractor had a conflict of interest, Callaghan Innovation commissioned consulting firm EY to review the due diligence process. EY identified no significant deficiencies in the due diligence process that would have changed the outcome of the process.

However, because the scope of EY’s review did not address the conflict of interest, the review did not resolve the concerns that Manaaki raised. This has led to ongoing questions about the procurement.

The due diligence reports were shared and entered the public domain

Callaghan Innovation did not meet its obligations of confidentiality, which are a necessary part of the procurement process.

Callaghan Innovation decided to share copies of the due diligence reports with two different business units in the Ministry of Business, Innovation and Employment and with New Zealand Trade and Enterprise. It did this for purposes outside the scope of the Start-up programme procurement. The terms of the procurement did not allow Callaghan Innovation to share information with other public organisations.

The other agencies were not informed that the due diligence was mostly based on testimony, that it included matters that had not been corroborated, and that not all findings had been put to Manaaki. Nor were Manaaki's earlier responses to the first report included. Callaghan Innovation never told Manaaki that it had shared the reports.

Public organisations need to consider whether and what information is appropriate to share with other organisations, especially when privacy, confidentiality, and commercial interests need to be considered. We did not see evidence that Callaghan Innovation adequately considered whether it could or should share the information.

In my view, it was neither fair nor reasonable to share the due diligence reports without appropriate reason or process, or without an adequate opportunity for the subject of those allegations to have their response noted. In sharing the due diligence information, Callaghan Innovation did not demonstrate the transparency or fairness that I expect – or, in my opinion, that the public expects – from a public organisation.

These concerns have been amplified by the two due diligence reports being sent from an anonymous email address to many external individuals and organisations after the procurement.

Maintaining the confidentiality of the information provided to public organisations goes to the heart of trust and confidence in procurement processes and the public sector more generally. Callaghan Innovation commissioned the due diligence reports and was responsible for their safekeeping. Although the source of the leak remains unknown, it is deeply concerning that those reports subsequently made their way into the public domain.

Concluding remarks

Callaghan Innovation's objective to protect founders was well intentioned. Unfortunately, in my view, Callaghan Innovation should have considered its actions more carefully throughout the due diligence process.

In particular, Callaghan Innovation should have considered how it would need to manage the potentially sensitive information the process might uncover and the risk of bias that the contractor's earlier work posed. This has weakened the procurement process and exposed Callaghan Innovation to the risk of challenge.

For most suppliers, the worst outcome is being unsuccessful in a procurement. Here, two actions have significantly amplified the impact of a single procurement decision on Manaaki. These are Callaghan Innovation sharing the due diligence reports with other public organisations without a solid basis for doing so and without informing the tenderers, and the due diligence reports being leaked.

Delivering effective services to the public depends on maintaining trust between the public sector and the businesses that seek to deliver those services. Suppliers taking part in a public organisation's procurement process expect to be treated fairly and transparently. When they aren't, it can negatively impact market confidence and risks eroding trust and confidence in the integrity of the public sector.

Callaghan Innovation advised me that it has reflected on this procurement process, the recommendations from the EY review, and what changes it might make for the future. We detail the proposed areas for improvement in Part 6 of this report. I will be interested in how this work progresses.

I thank Callaghan Innovation, the Ministry of Business, Innovation and Employment, New Zealand Trade and Enterprise, EY, and the individuals involved in the procurement that we met for their assistance with this inquiry.

Nāku noa, nā



John Ryan
Controller and Auditor-General | Tumuaki o te Mana Arotake

23 November 2023

Introduction

- 1.1 Callaghan Innovation is a Crown agent that supports businesses in the innovation sector – from start-up companies to experienced research and development companies.² Callaghan Innovation is monitored by the Ministry for Business, Innovation and Employment (MBIE).
- 1.2 Callaghan Innovation’s work includes providing hands-on support for start-up companies, capability-building programmes and workshops, networking opportunities, and research and development grants.
- 1.3 Callaghan Innovation has a Founder and Start-up Support Programme (the Start-up programme), which offers entrepreneurial capability-building, start-up development, and investment-readiness support. Other organisations provide this support.
- 1.4 The Start-up programme (which replaced the Founder Incubator and Accelerator programme) aims to build capability, accelerate growth in start-up companies through mentoring and training, and increase the number of tech start-up companies in New Zealand. The Start-up programme also aims to “lift diversity in start-ups and entrepreneurship, especially Māori and female representation”.
- 1.5 Providers of the Start-up programme need to work closely and extensively with founders who are in the early stages of developing their business.³ Callaghan Innovation told us that these founders often work alone and are potentially vulnerable to poor behaviour from service providers, investors, and/or mentors because there is often a significant power imbalance.
- 1.6 Because of this, Callaghan Innovation wanted to select providers for its Start-up programme who would provide a safe and supportive environment for founders.
- 1.7 The Start-up programme is for a three-year contract term (with an optional two-year renewal), with \$2.86 million of funding available each year. Each supplier receives an allocation of this funding and must co-fund the services they provide at a rate of 2:1. That means \$2 of funding from private sector or other sources for every \$1 of Callaghan Innovation funding.

2 A Crown agent is a Crown entity that must give effect to government policy when directed by a responsible Minister.

3 A founder is a person who founds or establishes a company or institution.

The procurement process for the Start-up programme

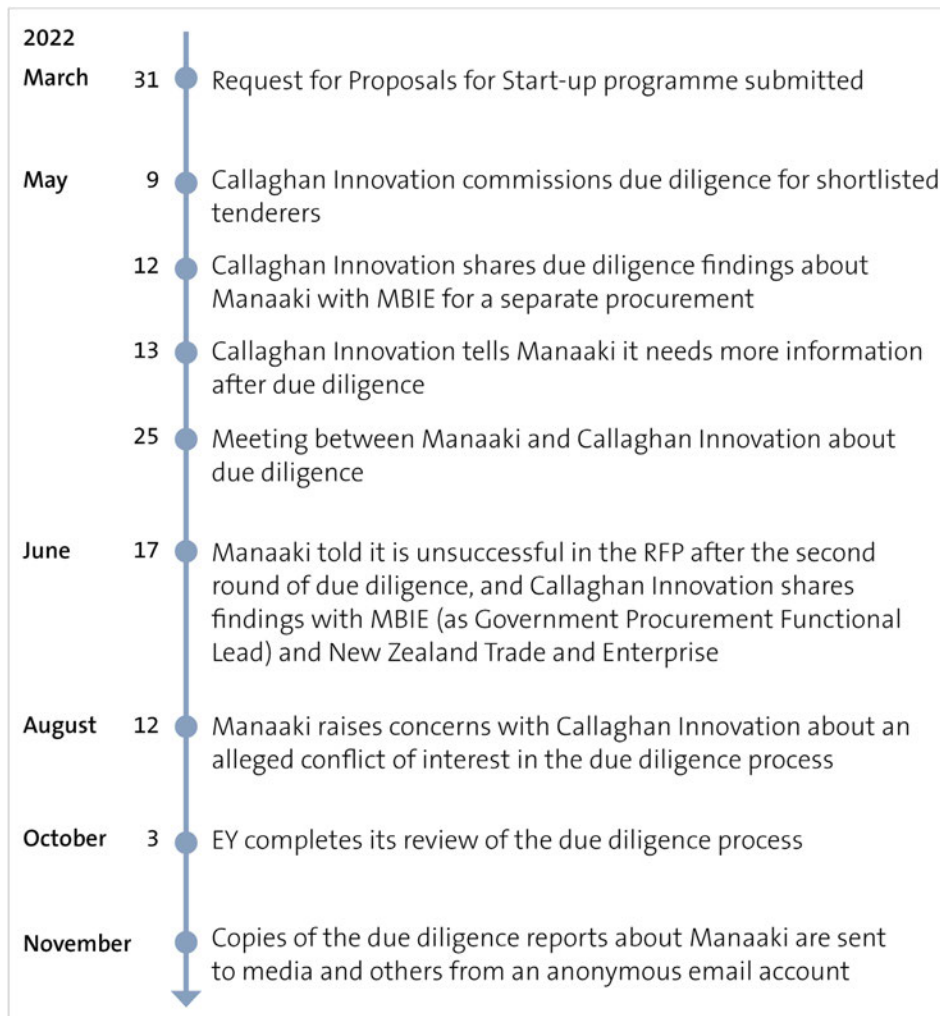
- 1.8 Callaghan Innovation released a registration of interest on 11 November 2021 to identify potential providers for its Start-up programme. A request for proposal (RFP) process for the shortlisted candidates followed, which closed on 31 March 2022. Manaaki, a subsidiary of We Are Indigo, was one of the shortlisted candidates invited to take part in the RFP.⁴
- 1.9 Callaghan Innovation told Manaaki that it was unsuccessful in the procurement because of the due diligence findings. This was carried out after the initial evaluation phase.
- 1.10 Some unusual aspects of the procurement included using a licensed private investigator to carry out the due diligence, sharing the due diligence findings about Manaaki with other public organisations, and that information about the procurement was made public. Manaaki later raised concerns about the procurement process with Callaghan Innovation.
- 1.11 Figure 1 shows a timeline of the main events in the procurement for the Start-up programme and after Callaghan Innovation had made the procurement decision.

Why we were interested in this matter

- 1.12 We were aware of issues about the procurement for the Start-up programme from news articles published in October and November 2022. Manaaki also raised concerns about the procurement and the due diligence process with us. These concerns included that:
- Callaghan Innovation did not properly manage a conflict of interest;
 - the due diligence process lacked balance and natural justice; and
 - Callaghan Innovation breached confidentiality by sharing information from the procurement with others.
- 1.13 Because of these concerns and the potential non-compliance with the Government Procurement Rules (the Procurement Rules) and expectations, we decided to inquire into this matter under section 18 of the Public Audit Act 2001.

⁴ Manaaki.io (trading as Manaaki), a subsidiary of We Are Indigo Ltd, applied for the Founder and Start-up Programme RFP as part of a consortium with the Australian company Startmate. We refer only to Manaaki and We Are Indigo in this report because the matters relevant to this inquiry do not directly involve Startmate.

Figure 1
Timeline of events for the Start-up programme, from March 2022 to November 2022



The Government Procurement Rules

- 1.14 Callaghan Innovation is a “mandated agency” for government procurement, which means that it must follow the Procurement Rules.⁵
- 1.15 The Procurement Rules include principles that provide overarching values for procurement and apply to all public organisations. *Principle 5: Play by the rules* requires all government agencies to:
- *Be accountable, transparent and reasonable.*
 - *Make sure everyone involved in the process acts responsibly, lawfully and with integrity.*
 - *Stay impartial – identify and manage conflicts of interest.*
 - *Protect suppliers’ commercially sensitive information and intellectual property.*
- 1.16 We do not refer to all the Procurement Rules and principles that Callaghan Innovation must comply with in this report. We have focused primarily on two of the Procurement Rules because we consider that they are relevant to the concerns raised with us, but we do refer to other relevant rules where appropriate. These two Rules are:
- *Rule 2: Integrity;* and
 - *Rule 4: Protection of supplier information.*
- 1.17 *Rule 2: Integrity* explains how public organisations must safeguard the integrity of their procurement activities and processes. Public organisations must have policies that require that:
- *those involved in procurement decisions stay impartial;*
 - *procurement processes are fair, transparent and reasonable;* and
 - *all staff involved in procurement act responsibly, lawfully and with integrity.*
- 1.18 *Rule 4: Protection of supplier information* explains that public organisations must protect suppliers’ confidential or commercially sensitive information.
- 1.19 The Procurement Rules refer to the standards of integrity and conduct that the Public Service Commissioner sets. Te Kawa Mataaho Public Service Commission’s *Standards of integrity and conduct* (the PSC Code of Conduct) requires public organisations to maintain policies and procedures that are consistent with the PSC Code of Conduct’s expectations of fairness, impartiality, and trustworthiness.
- 1.20 To support public trust and confidence, it is important that public organisations’ procurement processes are consistent with the Procurement Rules. Managing conflicts of interest well is also important in preserving the trust and confidence of suppliers in public sector procurement.

What we looked at

- 1.21 Our inquiry looked at Callaghan Innovation’s procurement process for the Start-up programme, including:
- the due diligence process;
 - how Callaghan Innovation identified and managed conflicts of interest in the due diligence process;
 - Callaghan Innovation sharing confidential information about Manaaki from the procurement; and
 - Callaghan Innovation’s response to concerns about the procurement.
- 1.22 Our inquiry focused on whether Callaghan Innovation’s actions and processes were consistent with the Procurement Rules and, where appropriate, the PSC Code of Conduct.
- 1.23 We did not seek to re-perform the due diligence or form a view on the procurement’s outcome. Accordingly, we have not spoken to those people who were interviewed as part of the due diligence process.

What we did

- 1.24 As part of our inquiry, we:
- examined documents about the procurement from Callaghan Innovation and Manaaki;
 - interviewed employees at Callaghan Innovation, including the current Chief Executive, the procurement team, the legal team, and Callaghan Innovation Board members;
 - met with the former Chief Executive of Callaghan Innovation;⁶
 - interviewed others involved in the procurement, including Manaaki, the contractor who carried out the due diligence, and people from the other public organisations that received the due diligence reports about Manaaki; and
 - met with EY to understand its review of the due diligence process.
- 1.25 When we refer to Callaghan Innovation’s Chief Executive, we are referring to the former Chief Executive who was in the role during the procurement. We use “current Chief Executive” to refer to the Chief Executive at the time we wrote this report.

⁶ The previous Chief Executive handed over her duties as Chief Executive on 4 July 2022. The current Chief Executive was appointed on 21 September 2022. He was previously the interim Chief Executive from 4 July 2022.

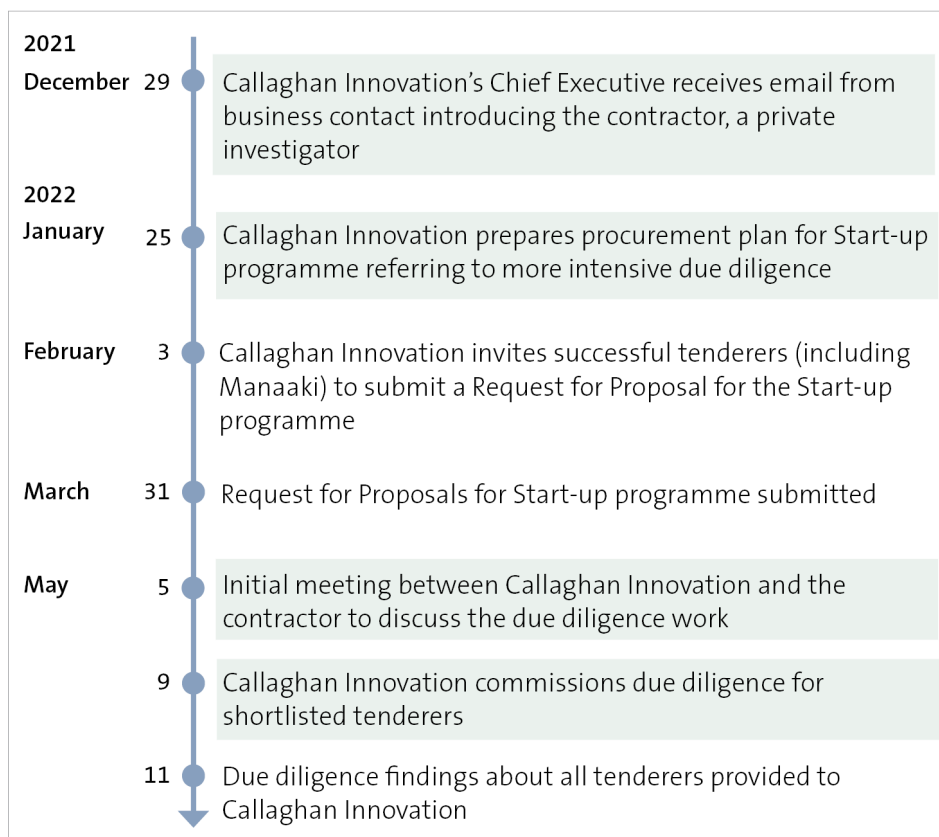
Structure of this report

- 1.26 In Part 2, we discuss the due diligence process for the Start-up programme procurement, including how the due diligence work was commissioned and carried out.
- 1.27 In Part 3, we discuss how Callaghan Innovation considered the findings of the due diligence process.
- 1.28 In Part 4, we discuss how Callaghan Innovation managed an alleged conflict of interest in the due diligence process.
- 1.29 In Part 5, we discuss how the findings of the due diligence about Manaaki were shared with other public organisations.
- 1.30 In Part 6, we discuss what happened after the procurement, including how Callaghan Innovation responded to the concerns raised about its procurement process and that information about the procurement entered the public domain.

The due diligence process

- 2.1 In this Part, we describe:
- what due diligence involves;
 - Callaghan Innovation’s due diligence process;
 - how Callaghan Innovation commissioned the due diligence work;
 - what Callaghan Innovation told tenderers;
 - how the due diligence process was carried out; and
 - our observations about the due diligence process.
- 2.2 Figure 2 sets out the stages of Callaghan Innovation’s due diligence process that we describe in this Part.

Figure 2
Timeline of events for the due diligence process, from December 2021 to May 2022



What due diligence involves

- 2.3 Ideally, identifying a serious issue or risk with a supplier should occur before a contract is awarded. Organisations do this through due diligence, which is a standard process in any procurement.
- 2.4 Due diligence typically involves confirming the financial resilience and viability, technical ability, and capacity of the tenderer and any subcontractors to deliver the goods or services. It often requires professional legal and financial review, assessment, and advice.
- 2.5 In practice, due diligence involves gathering and checking information from various sources, including from the tenderer. The more significant the contract, the more comprehensive the due diligence process should be.
- 2.6 The due diligence process can often include:
- assessing the tenderer’s ability to deliver the goods or services for the price tendered or proposed;
 - credit and reference checks;
 - site visits to check the adequacy and condition of infrastructure, equipment, and resources that a tenderer will use;
 - examining work or product samples; or
 - considering whether there is a risk of fraud and corruption.⁷
- 2.7 MBIE has issued guidelines on this, with practical advice about planning for and conducting due diligence.⁸ Organisations should read the guidelines alongside the Procurement Rules and other guidance on public sector procurement, which include the expectation that the process is fair to all parties.

Callaghan Innovation’s due diligence process

Background

- 2.8 Callaghan Innovation’s Chief Executive⁹ told us that she was concerned about unethical behaviour towards founders in the innovation sector, including bullying, harassment, and sexism. The Chief Executive said that she had heard about this sort of behaviour in the sector and that specific concerns had been raised with Callaghan Innovation directly.

⁷ See Controller and Auditor-General (2008), *Procurement guidance for public entities*, at oag.parliament.nz.

⁸ See “Conducting due diligence checks”, at procurement.govt.nz.

⁹ When we refer to Callaghan Innovation’s Chief Executive, we are referring to the former Chief Executive who was in the role during the procurement. We use “current Chief Executive” to refer to the Chief Executive at the time we wrote this report.

- 2.9 Because the Start-up programme supports founders who are sometimes vulnerable, it was particularly important for Callaghan Innovation to make sure that it put founders in safe environments. The Ministerial Direction for the Start-up programme also required Callaghan Innovation to focus on improving diversity, particularly for women, Māori, and Pasifika.
- 2.10 As a result, the RFP document included evaluation criteria about ethics and responsible behaviour and fostering diversity. In the scoring section of the RFP document, the categories tenderers could be scored on included “ethics and responsible behaviour”, which was worth 20% of the total score, and “diversity”, which was worth 10% of the total score. The RFP document also described the need to understand Māori and female entrepreneurs and their needs.
- 2.11 For “ethics and responsible behaviour”, tenderers needed to confirm that they had policies that addressed ethical conduct, well-being, and health and safety. The RFP document also asked for examples of how tenderers had implemented these policies. For “diversity”, tenderers needed to provide plans and targets to increase diversity and demonstrate an understanding of how to achieve this.
- 2.12 Tenderers were also provided with a copy of the proposed contract. This referred to the New Zealand Government Procurement Supplier Code of Conduct, which reinforces expectations about ethical behaviour and human rights.

The due diligence process

- 2.13 Because of her concerns about unethical behaviour in the sector, the Chief Executive wanted the due diligence process for selecting providers to deliver the Start-up programme to be more intensive than usual. This was described to us as a pilot.
- 2.14 In January 2022, Callaghan Innovation prepared a procurement plan for the Start-up programme that set out examples of due diligence that Callaghan Innovation could do. This included directly contacting any past or current contacts of tenderers that Callaghan Innovation came across in its dealings.
- 2.15 The RFP document replicated this part of the plan and specified that tenderers “agree not to prevent those contacts from engaging with [Callaghan Innovation] on any matter relating to the RFP”. The RFP also stated that Callaghan Innovation might use a third party to help with enquiries.

- 2.16 We asked Callaghan Innovation what this more intensive due diligence process involved. The Chief Executive told us that Callaghan Innovation had used an AGILE approach to develop the more intensive due diligence process.¹⁰
- 2.17 The Chief Executive also told us that she understood that Callaghan Innovation’s procurement team had legal support and had worked with an external probity advisor to manage any risks associated with the due diligence. The probity advisor told us that their involvement was limited, they gave advice based on the information Callaghan Innovation provided at the time, and they were not involved in the process in detail.¹¹
- 2.18 In the Chief Executive’s view, the RFP document clearly set out what Callaghan Innovation could and could not do.

How Callaghan Innovation commissioned the due diligence

- 2.19 In December 2021, a business contact, Mr B, emailed the Chief Executive saying that, “as promised”, they were connecting the Chief Executive with a licensed private investigator (who we refer to as the contractor in this report) for any due diligence that might be needed for procurement. The Chief Executive had previously met the contractor at a conference.
- 2.20 In an email responding to Mr B and the contractor, the Chief Executive told the contractor about allegations she had heard about tenderers on the short list for a procurement. These included an allegation that one provider had been “taking government money with fraudulent practices underneath” and complaints of sexism and bullying about another.
- 2.21 The Chief Executive told us that she gave the contractor’s contact details to Callaghan Innovation’s procurement team and recommended that the team use the contractor for due diligence. After receiving the recommendation, Callaghan Innovation’s legal team sought external legal advice about contracting a licensed private investigator to carry out due diligence.
- 2.22 The legal team then briefed the Chief Executive. The Chief Executive decided that Callaghan Innovation would use the contractor to carry out the due diligence.

10 The AGILE methodology is a way to manage a project by breaking it up into several phases. It involves constant collaboration with stakeholders and continuous improvement at every stage.

11 The probity advisor was engaged to provide probity advice for aspects of the Start-up programme. This included reviewing procurement documents supplied by Callaghan Innovation (including the procurement plan (for context), communications log, supplier briefing material, final evaluation score sheets, the evaluation recommendation report, the preliminary due diligence report, and the letter to be sent to unsuccessful tenderers), reviewing conflict of interest declarations and management plans made available by Callaghan Innovation, attending the evaluation panel moderation meeting and a meeting with Manaaki about the due diligence findings, and providing ad hoc advice on the preliminary due diligence report and the scope of the subsequent review of the due diligence process.

- 2.23 On 5 May 2022, Callaghan Innovation sent the contractor a contract using the Government Model Contract for Services template. The contract stated that Callaghan Innovation and the contractor would “agree the scope and timeframe of any due diligence activities required, and the parties involved”. Payment was based on an hourly rate. The contract was signed on 9 May 2022.
- 2.24 The contract required both parties to comply with applicable laws and regulations. At a meeting with the contractor on 5 May 2022, Callaghan Innovation’s legal team advised the contractor to comply with legislation (such as the Privacy Act 2020 and the Search and Surveillance Act 2012), and the PSC Code of Conduct and standards for information collection when doing the due diligence.
- 2.25 On 9 May 2022, Callaghan Innovation gave the contractor the names of the six shortlisted tenderers for the Start-up programme, including Manaaki/We Are Indigo. On the same day, the procurement team noted in an email to the contractor that “you have stated that you have no conflicts of interest related to this activity”. We discuss conflicts of interest in Part 4.
- 2.26 The contractor told us that he did not agree a formal scope of work with Callaghan Innovation. Instead, Callaghan Innovation relied on the contractor’s expertise in carrying out due diligence. Callaghan Innovation told us that the contractor understood that his role was to provide objective information about the shortlisted tenderers for Callaghan Innovation to evaluate.

What Callaghan Innovation told tenderers about the due diligence process

- 2.27 Sections 3.8 and 3.9 of the RFP document set out the due diligence activities that Callaghan Innovation might carry out (see Appendix 1). These sections of the RFP also:
- stated that Callaghan Innovation could use third parties to help with enquiries;
 - stated that Callaghan Innovation could perform variable levels of due diligence on tenderers; and
 - explained how past experience with tenderers could be used in the due diligence.
- 2.28 Paragraph 6.6 of the RFP’s terms and conditions sets out that Callaghan Innovation could collect additional information from a relevant third party, such as a referee or a previous or existing client (see Appendix 2). Tenderers agreed to waive any confidentiality applying to information that a third party held (apart from commercially sensitive pricing information) so that Callaghan Innovation could use that information to evaluate the tenderer’s proposal.

- 2.29 Although Callaghan Innovation signalled in the RFP that it could use a third party to do due diligence, it did not tell tenderers who would be carrying out the due diligence as the procurement progressed.
- 2.30 A member of the Callaghan Innovation procurement team told us that it was concerned about the “optics” of using a licensed private investigator to do the due diligence and that this might alarm tenderers. Therefore, there was a reluctance to inform tenderers that Callaghan Innovation was using a private investigator.

How the due diligence process was carried out

- 2.31 The contractor started the due diligence process by verifying information about the tenderers – for example, verifying the company name and checking the identity of directors.
- 2.32 To identify who to interview for the due diligence, the contractor looked at publicly available information (for example, information from websites and media articles) and responses from the shortlisted tenderers to the RFP document. The contractor confirmed that the people he contacted agreed to be interviewed voluntarily.
- 2.33 For the due diligence on Manaaki, the contractor explained to us that he found an article about a dispute between We are Indigo (Manaaki’s parent company) and another company. The contractor interviewed the director of that company. The director then suggested that the contractor talk to three other businesses that had had dealings with Manaaki.
- 2.34 The contractor told us that he had wanted to speak to Manaaki directly as part of the due diligence but that Callaghan Innovation said that it would talk to Manaaki. Callaghan Innovation told us that this was the more suitable approach because Callaghan Innovation was responsible for assessing and selecting the tenderers.
- 2.35 The contractor prepared a report on each of the shortlisted tenderers for Callaghan Innovation. The report about Manaaki set out the contractor’s findings, including statements from people he interviewed. We discuss the due diligence findings for Manaaki in Part 3.

Our observations about the due diligence process

More planning was needed, and there was a lack of documentation about the due diligence process

- 2.36 Callaghan Innovation described the more intensive due diligence process as a pilot. Pilots typically assess the suitability, feasibility, benefits, and costs of expanding a process more widely.
- 2.37 When we asked the Chief Executive about the due diligence process, she told us that Callaghan Innovation used an AGILE approach to develop it. An AGILE approach typically emphasises iterative planning and communication through regular feedback.
- 2.38 We did not see evidence that Callaghan Innovation had taken a considered approach to how the due diligence process would work. Callaghan Innovation told us that it planned the next steps as the due diligence proceeded and that it engaged with legal and probity advisors on issues as they arose.
- 2.39 Callaghan Innovation directly selected the contractor to carry out the due diligence, which its procurement policy allowed because it was a low-value procurement. Callaghan Innovation told us that it took the Chief Executive's previous knowledge of the contractor from having met him at a conference into account.
- 2.40 We saw no evidence that the procurement team formally assessed or documented the contractor's skills or experience in due diligence for public sector procurements. We saw few documented instructions, no documented scope for the due diligence at the outset of the engagement, and limited correspondence between the contractor and Callaghan Innovation.
- 2.41 Most interactions between Callaghan Innovation and the contractor were verbal. No records were kept, and those involved have differing recollections about what guidance Callaghan Innovation gave the contractor. We do not consider that this is consistent with Rule 52 of the Procurement Rules, which requires organisations to keep good records of the procurement process and decisions.
- 2.42 It was reasonable for Callaghan Innovation to want to put in place a more intensive due diligence process, given the nature of its concerns about bullying, harassment, and unethical behaviour.

- 2.43 We accept that some flexibility might be needed to deal with unexpected events. However, we do not consider that Callaghan Innovation gave enough forethought to what safeguards and protections it might need when starting a process that's objective was to identify and exclude tenderers who might have previously engaged in undesirable conduct.
- 2.44 Given the stated concerns underlying the choice of due diligence process, it was reasonably foreseeable that issues related to poor behaviour and conduct might be raised and that, as a result, sensitive information might feature in discussions with interviewees.
- 2.45 Some examples of things that we consider Callaghan Innovation reasonably ought to have thought about and documented in its planning include:
- what the due diligence process would and would not involve;
 - what guidance or legislation applied;
 - who would do the due diligence and what skills and experience they would need (particularly in light of the potential vulnerability of the parties being interviewed);
 - what protections would apply to individuals participating in the due diligence process;
 - what information Callaghan Innovation would document, how the information would be used, and how the information would be kept secure;
 - expectations of confidentiality – for example, what interviewees would be told about how their information might be used and what the subject of the due diligence would be told;
 - what Callaghan Innovation would tell tenderers about the process, including opportunities for tenderers to respond to any adverse findings;
 - how Callaghan Innovation would consider and assess the results of the due diligence process, including how the process would reflect the principles of natural justice; and
 - the circumstances where confidentiality obligations might need to be overridden – for example, risk factors that might warrant a referral to another external agency.¹²
- 2.46 Apart from an email reminding the contractor of the need to abide by relevant legislation, we did not see evidence that Callaghan Innovation had addressed these matters at the planning stage. We discuss some of these matters in Part 3.

¹² This is of particular relevance because Callaghan Innovation told us that, in late 2022, it contacted first the Police then Worksafe about the due diligence findings about Manaaki. Neither agency chose to investigate the complaint.

Use of a private investigator

- 2.47 The RFP document set out what Callaghan Innovation could do for its due diligence, including using a third party. We were told that there had been concerns about the “optics” of using a private investigator and that it was decided to not tell tenderers that a private investigator was going to do the work. This suggests that Callaghan Innovation was alert to the risks of using a private investigator.
- 2.48 We consider that this is inconsistent with Rule 2 of the Procurement Rules, which requires public organisations to be fair and transparent when dealing with suppliers. In our view, Callaghan Innovation should have told tenderers that it was using a private investigator to do the due diligence and who that person was.
- 2.49 Not disclosing who would carry out the due diligence meant that tenderers could not raise any potential conflicts of interest or risks of bias. This meant that Callaghan Innovation missed an early opportunity to identify and manage an alleged conflict of interest that Manaaki raised with it later. We discuss this in Part 4.
- 2.50 Callaghan Innovation told us subsequently that it made a good faith decision to enable the contractor to proceed without first informing tenderers who the contractor was. Callaghan Innovation acknowledges that, in hindsight, its judgement might not have been correct.

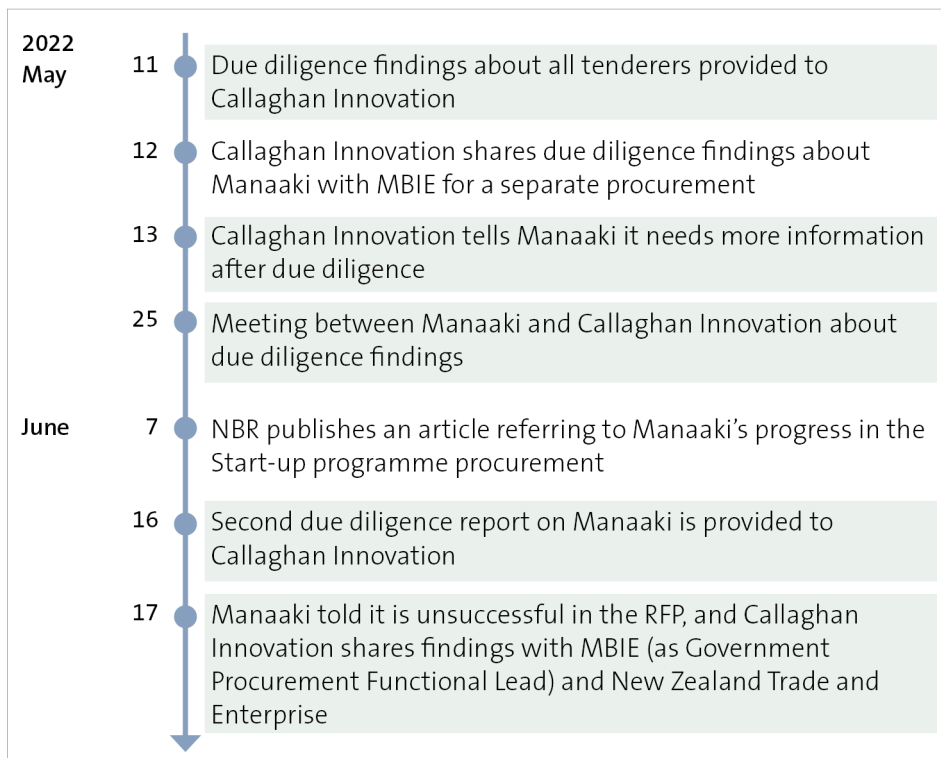
3

The due diligence findings

- 3.1 In this Part, we describe:
- how Callaghan Innovation considered the due diligence findings about Manaaki;
 - the outcome of the procurement for Manaaki; and
 - our observations about Callaghan Innovation’s processes for considering the information about Manaaki.

3.2 Figure 3 sets out the stages of the due diligence process that we describe in this Part.

Figure 3
Stages of the due diligence process, from May 2022 to June 2022



How Callaghan Innovation considered the due diligence findings about Manaaki

3.3 In this section, we describe how Callaghan Innovation considered the due diligence findings about Manaaki. Where it is necessary to, we also describe the findings and the evidence that the findings were based on.

The initial due diligence report about Manaaki

3.4 The contractor reported the findings of the due diligence to Callaghan Innovation on 11 May 2022.¹³ The report concluded that the application from Manaaki (care of its parent company We Are Indigo) did not satisfy “reasonable due diligence expectations”.

3.5 The report stated that several stakeholders and previous business associates had provided information that put Manaaki in a “show cause” position¹⁴ because of multiple allegations of historic performance issues and professional misconduct (which constitute grounds for elimination under section 6.22 of the RFP).

3.6 The report also stated that:

... the contents of section 4 (Company review), if validated, showcase some of the most serious unethical practices I have investigated in a commercial capacity [and] if further investigations were to occur, we reasonably expect to identify further information that would support our findings.

3.7 The report contained several serious allegations about Manaaki’s business conduct, supported by statements from individuals who the contractor had interviewed. It included allegations of:

- failing to honour agreements and pay accounts;
- a lack of concern about data and privacy protection;
- unauthorised business behaviour and practices;
- intimidation, harassment, and bullying of suppliers and stakeholders;
- unauthorised spending of business capital; and
- using misleading data for investment purposes.

3.8 The report recommended that Manaaki not progress in the Start-up programme procurement.

3.9 The procurement team met with the legal team to discuss the due diligence report about Manaaki. A member of the legal team told us that she was

¹³ The due diligence report was on We are Indigo and Startmate. The report stated that “We have not found anything adverse about Startmate Ops Pty Ltd, primarily because they are an Australian based company and data holdings are limited.”

¹⁴ This means that Manaaki would have to give reasons why a certain action (for example, removal from the procurement) should not be put into effect.

concerned that the report did not have enough evidence to support the allegations. A member of the Callaghan Innovation procurement team said that the findings were a surprise – but noted that the report contained the caveat “if evidenced”.

- 3.10 Callaghan Innovation told us that it did not have a process for dealing with the due diligence findings because, when it decided to carry out more intensive due diligence, “there had not been anything to suggest a process would be needed”.
- 3.11 Callaghan Innovation got advice from its external probity advisor about the due diligence findings. We have been given differing explanations of the advice it provided.
- 3.12 The procurement team told us that the external probity advisor said that the findings from the due diligence were enough to justify Callaghan Innovation’s decision to not use Manaaki as a provider for the Start-up programme. However, the probity advisor told us that it raised concerns about the lack of evidence to substantiate the reported findings with Callaghan Innovation at the time.
- 3.13 The probity advisor told Callaghan Innovation that, to support a decision to eliminate Manaaki from progressing further, Callaghan Innovation needed to consider how confident it was in the findings of the due diligence and how much reliance it could place on those findings.
- 3.14 Callaghan Innovation also told us the probity advisor said that Manaaki would likely ask for a right-of-reply meeting but that Callaghan Innovation was under no obligation to offer it. The probity advisor told us that its advice was that, at a minimum, it would expect the tenderer to be given a right of reply before Callaghan Innovation considered eliminating the tenderer from the process.
- 3.15 The report about Manaaki was sent to the Chief Executive and Callaghan Innovation’s Chief Product Officer on 11 May 2022 and the chairperson of the Board on 12 May 2022.¹⁵ The Chief Executive told us that, after reading the report, it would have been difficult to appoint Manaaki to its panel without further discussions with Manaaki.
- 3.16 On 13 May 2022, Callaghan Innovation’s procurement team wrote to Manaaki saying that it could not give Manaaki a contract and that it would need to collect more information. It also told Manaaki that it would be publicly announcing the tenderers who had been successful in the procurement. Callaghan Innovation suggested that Manaaki might want to ask for a formal meeting, which Manaaki did.
- 3.17 Callaghan Innovation did not give Manaaki a copy of the report or an outline of the report’s allegations. Between 15 and 17 May 2022, Manaaki emailed

Callaghan Innovation offering to explain the concerns that it thought the due diligence process might have identified.

Callaghan Innovation and Manaaki met to discuss the due diligence findings

- 3.18 On 25 May 2022, Callaghan Innovation’s Chief Executive, the procurement team, and the external probity advisor met virtually with the Manaaki management team to discuss the due diligence findings.
- 3.19 Callaghan Innovation did not share the report with Manaaki. Callaghan Innovation verbally summarised the allegations in the report and gave Manaaki the opportunity to respond.
- 3.20 The meeting’s minutes, which Callaghan Innovation prepared,¹⁶ record Callaghan Innovation asking high-level questions about some of the concerns raised in the due diligence report.
- 3.21 In the meeting, Manaaki responded to the allegations put to it. However, Manaaki told us that, because the questions were not specific, it had to guess what the concerns were. In summing up at the end of the meeting, Manaaki said:
- We get good results, but we can reflect on the manner where we do our mahi. It has given us cause to really think about and something we need to work on.*
- 3.22 Manaaki told us that it left the meeting with the impression that it was unlikely to resolve the issues within the time frame of the procurement. Afterwards, Manaaki sent several emails to follow up, providing further information and contact details of other organisations Manaaki had worked with.
- 3.23 In these emails, Manaaki acknowledged that it had had disputes in some of its partnerships but said that these had been fully resolved.

Callaghan Innovation commissioned more due diligence on Manaaki

- 3.24 After meeting with Manaaki, the Chief Executive told Callaghan Innovation’s legal team that she wanted more due diligence on Manaaki. The Chief Executive told us that doing more due diligence work was “giving Manaaki the benefit of the doubt”.
- 3.25 On 26 May 2022, Callaghan Innovation sought external probity advice on whether it could do a second round of due diligence. Callaghan Innovation was advised that:
- ... there are sufficient clauses in the RFP document (including the RFP process, terms, and conditions) that allows Callaghan Innovation to undertake further due diligence checks to obtain more information to help determine the preferred*

¹⁶ Callaghan Innovation’s probity advisor confirmed that the meeting’s minutes were a fair reflection of what was discussed at the meeting, and Manaaki has subsequently confirmed that the minutes are consistent with its notes.

respondent. If the respondent has been officially informed by Callaghan Innovation that they have been unsuccessful, then further due diligence cannot be undertaken, and [Callaghan Innovation will] need to seek legal advice on any further enquiries that Callaghan Innovation may wish to undertake.

- 3.26 The same day, Callaghan Innovation verbally instructed the contractor to do further due diligence on Manaaki. Callaghan Innovation asked the contractor to provide as much information as possible and follow up on the lines of inquiry set out in the first due diligence report.
- 3.27 Callaghan Innovation gave the contractor the minutes from the 25 May 2022 meeting with Manaaki and follow-up emails from Manaaki, which included additional referees. A member of Callaghan Innovation’s legal team told us that they asked the contractor to contact the referees that Manaaki provided to ensure that the due diligence process was fair and balanced.
- 3.28 In its emails to Callaghan Innovation, Manaaki raised concerns that some of the parties involved in the due diligence had a vendetta against Manaaki. It cited social media posts by Mr B insinuating that Manaaki were “bad actors” as evidence of this.
- 3.29 Manaaki also considered that there was an alignment between blogs published by Mr B and the claims made in the 25 May 2022 meeting with Callaghan Innovation. Mr B was the business contact who had given the Chief Executive the contractor’s contact details.
- 3.30 After receiving Manaaki’s correspondence, the Chief Executive asked the contractor to interview Mr B. The contractor said that he told Callaghan Innovation that Mr B was known to him.
- 3.31 While the second due diligence was under way, an article published in the *National Business Review* (NBR) reported that Manaaki was facing more questions from Callaghan Innovation for this procurement.
- 3.32 The Chief Executive alerted Callaghan Innovation’s Board to the article, sent it a copy of the first due diligence report about Manaaki, and told it that a second round of due diligence was under way. The chairperson of the Board told us that the Board was engaged with the matter from that point on.

Callaghan Innovation received a second due diligence report about Manaaki

- 3.33 On 16 June 2022, the contractor sent a second due diligence report about Manaaki to Callaghan Innovation. The contractor told us that he had tried to contact all the referees that Manaaki had provided to Callaghan Innovation and that he had referred to the minutes of the 25 May 2022 meeting between Manaaki and Callaghan Innovation when talking to the interviewees.
- 3.34 The Executive Summary of the second due diligence report said that “it was more probable than not that any ‘risk issues’ identified are corroborated by evidence and therefore require the subject of the investigation to be placed in a show-cause position”.
- 3.35 The report contained strongly worded descriptions of Manaaki’s business conduct and alleged poor behaviour. Some of the allegations in the second report were new, including an allegation about unauthorised acquisition of company shares to gain majority control.
- 3.36 The report also said that the investigation had identified “serious issues and potential misconduct”, which included an allegation that Manaaki had attempted to misappropriate government funds. We discuss this allegation in Part 4.
- 3.37 The report included the statements from the initial due diligence report, some supporting information for those original statements, as well as statements from additional interviewees, including several referees suggested by Manaaki. It was accompanied by exhibits that included copies of each interviewee’s original statement.
- 3.38 Callaghan Innovation’s legal team told us that it read the report and reviewed the supporting exhibits to determine whether the information gathered appeared to have been collected lawfully.
- 3.39 The second due diligence report cited a 7 June 2022 NBR article as corroborating evidence. This article featured the same people who the contractor had interviewed for the report.
- 3.40 The Chief Executive said that she was shocked by the findings and behaviours outlined in the second due diligence report and decided that she would not pursue working with Manaaki.
- 3.41 Callaghan Innovation considered whether the information in the second due diligence report met the reasons for excluding an otherwise compliant tenderer under the Procurement Rules. In Callaghan Innovation’s view, the information in the report justified excluding Manaaki from the procurement.

- 3.42 Callaghan Innovation’s Board was informed of the decision to reject the proposal from Manaaki and was given a copy of the second due diligence report on 17 June 2022. The Board told us that it subsequently questioned the Chief Executive about the due diligence process so that it could be sure that the process followed had been fair.

The outcome of the procurement for Manaaki

- 3.43 Callaghan Innovation decided that it could exclude Manaaki from the RFP for the following reasons (which are valid reasons under Rule 44 of the Procurement Rules):

- serious performance issues;
- professional misconduct in the form of unethical behaviour;
- offences against the New Zealand Government Procurement Supplier Code of Conduct; and
- issues that led to materially diminished trust and confidence.

- 3.44 On 17 June 2022, the Chief Executive signed a memorandum prepared by the procurement team recommending that Manaaki not be awarded a contract. The memorandum noted that “the findings represent an evidenced and ongoing trend of intolerable behaviours”.

- 3.45 Callaghan Innovation wrote to Manaaki to say that it was rejecting its proposal. Callaghan Innovation stated that:

[Callaghan Innovation’s] reservations are too significant to be comfortable appointing [Manaaki] to a government panel which will have many touch points with small businesses and entrepreneurs across New Zealand.

- 3.46 Manaaki told us that it did not know that more allegations had been made against it as part of the second round of due diligence. Manaaki became aware of the second due diligence report after the procurement was complete through an Official Information Act request.

- 3.47 On 1 July 2022, Callaghan Innovation had a feedback meeting with Manaaki that was described as a “wrap-up” phone call. At that meeting, Callaghan Innovation explained its reasons for excluding Manaaki from the procurement. These were the conclusions reached in the second due diligence report. As a result, Manaaki became concerned that further allegations had been made against it that it had not been told about.

- 3.48 In the meeting, Manaaki accepted that it had had challenges in some of its past commercial relationships but said that it considered that it had resolved them. Manaaki also accepted that the RFP terms enabled Callaghan Innovation

to exclude Manaaki from the procurement. However, Manaaki told Callaghan Innovation that it was concerned about the potential for ongoing commercial risk and information getting into the public domain.

Our observations about Callaghan Innovation’s response to the due diligence findings

- 3.49 Due diligence checks will often find matters that are of concern, and the process is complete only when decisions are made about how to manage those concerns. Some concerns will be “deal breakers” that automatically exclude a supplier.
- 3.50 However, a public organisation might disregard other concerns after further investigation. Many concerns raised will simply alert the public organisation to a characteristic of the supplier that warrants closer management or a watching brief.
- 3.51 The process of considering the results of due diligence must be fair, transparent, and reasonable, as Rule 2 of the Procurement Rules requires. The PSC Code of Conduct on fairness, which is referred to in the Procurement Rules, also states that public organisations must base their decisions on accurate information and observe the principles of natural justice.

There was a lack of natural justice and balance in Callaghan Innovation’s process

- 3.52 There was a lack of natural justice in the due diligence process. By natural justice, we mean being procedurally fair, which includes allowing someone the opportunity to comment on the fairness, accuracy, and balance of what has been said about them and/or to identify any errors.
- 3.53 Manaaki had limited opportunity to give its version of events in response to the first due diligence report. We acknowledge that some of the information in the due diligence reports could be considered sensitive – in particular, allegations of poor behaviour.
- 3.54 However, in our view, from a fairness perspective, Callaghan Innovation should have given Manaaki a description of the allegations made in the first due diligence report in enough detail for Manaaki to understand the concerns that had been raised and prepare a response to them before the 25 May 2022 meeting.
- 3.55 This would have enabled a more open, balanced, and fair discussion because Manaaki would have had a better understanding of the matters that were concerning Callaghan Innovation and could have responded to them in a considered way.

- 3.56 Callaghan Innovation has explained that it carried out more intensive due diligence in response to concerns about unethical behaviour that had been raised with it. Therefore, it could have reasonably foreseen that the more intensive due diligence process might collect information of a sensitive nature.
- 3.57 However, Callaghan Innovation did not give any thought to how it would handle the information from the more intensive due diligence process. This included any actions that it could take to address adverse findings, precautions it might need to keep information secure, or how it could best give effect to the principles of natural justice.
- 3.58 Despite having the minutes of the 25 May 2022 meeting between Callaghan Innovation and Manaaki, and correspondence from Manaaki that gives its account of the disputes in its previous business relationships, we could not see any evidence of the contractor testing this information with the interviewees, apart from asking further questions about one aspect of the concerns raised.
- 3.59 Although the second due diligence report included some positive feedback about Manaaki from some of its referees, the contractor did not speak to all the additional referees that Manaaki provided. In the report, the contractor concluded that he did “not believe [the evidence in support of Manaaki] is satisfactory to outweigh the overwhelming body of evidence that has been discovered”.
- 3.60 Callaghan Innovation told us that it took the information Manaaki gave it at the 25 May meeting and subsequent emails into account when making its decision. However, the final procurement memo quoted the conclusions set out in the second due diligence report (which were different from those in the first report) as its reasons for excluding Manaaki from the procurement.
- 3.61 Callaghan Innovation did not document how it had considered and responded to the information Manaaki had provided or give Manaaki any opportunity to comment on the second due diligence report.

Callaghan Innovation did not act fairly in how it excluded Manaaki from the RFP

- 3.62 New Zealand Government Procurement’s guidance on conducting due diligence states that, if the due diligence process identifies serious issues, the public organisation must consider excluding the supplier under Rule 44 of the Procurement Rules.
- 3.63 Rule 44 sets out several reasons for exclusion, and Callaghan Innovation highlighted these reasons for exclusion in the due diligence section of the RFP document. Rule 44 also states that a public organisation must not exclude a tenderer from a contract opportunity before it has evidence to support the reason for exclusion.
- 3.64 The Procurement Rules do not define what level of evidence is needed. However, when deciding to exclude a supplier, a public organisation would have to consider the overarching requirement of the Procurement Rules, which is that procurement processes must be fair.
- 3.65 Even though Callaghan Innovation had considered Rule 44 while planning its more intensive due diligence, we saw no evidence that it had considered what level of evidence it might need to support a decision to exclude a tenderer from the RFP. In our view, the requirement for fairness puts an obligation on public organisations to consider whether they have enough evidence to support serious allegations before they act on them.
- 3.66 Callaghan Innovation’s final procurement memo set out four reasons for excluding Manaaki from the procurement (see paragraph 3.43). The memo said that Callaghan Innovation relied on the findings in the due diligence reports.
- 3.67 Callaghan Innovation told us that its decision to exclude Manaaki was based mainly on the allegations of poor conduct and behaviour that had been raised. It is not clear from the procurement memo which findings support each of the reasons for exclusion or whether Callaghan Innovation considered that some findings and conclusions were more relevant to the decision than others.
- 3.68 The findings in the due diligence reports were mostly based on statements made by the people the contractor interviewed. We are not disputing that individual testimony is a valid form of evidence, and we acknowledge that poor behaviour often occurs without witnesses.

- 3.69 Manaaki also acknowledges that it has had disputes with some of its partners. This could have reasonably led to Callaghan Innovation having “diminished trust and confidence”¹⁷ in Manaaki as a supplier, especially because the contract was to support founders who might be vulnerable.
- 3.70 However, we question whether it was fair to rely on testimony alone when other serious findings were capable of being independently verified. The probity advisor also told us that it raised these concerns with Callaghan Innovation at the time.
- 3.71 Manaaki accepted that Callaghan Innovation was entitled to make the substantive decision it did about the procurement (although it raised concerns about the process and the accuracy of some aspects of the findings). Unfortunately, the information collected, the judgements made, and the reasons for excluding Manaaki set out in the procurement memo were later shared with other government agencies and subsequently made public. We discuss this in Parts 5 and 6.
- 3.72 Rule 44 also states that a public organisation should tell a supplier of its exclusion and the reasons for it.¹⁸ The letter Callaghan Innovation sent to Manaaki did not clearly explain that it was excluding Manaaki under Rule 44 and the reasons why.
- 3.73 For these reasons, including that Callaghan Innovation did not have a fair process for Manaaki to respond to the allegations made in the due diligence reports, we do not consider that Callaghan Innovation’s process for excluding Manaaki from the procurement was fair and transparent.

17 See “Rule 44: Reasons to exclude a supplier”, at procurement.govt.nz.

18 See “Rule 44: Reasons to exclude a supplier”, at procurement.govt.nz.

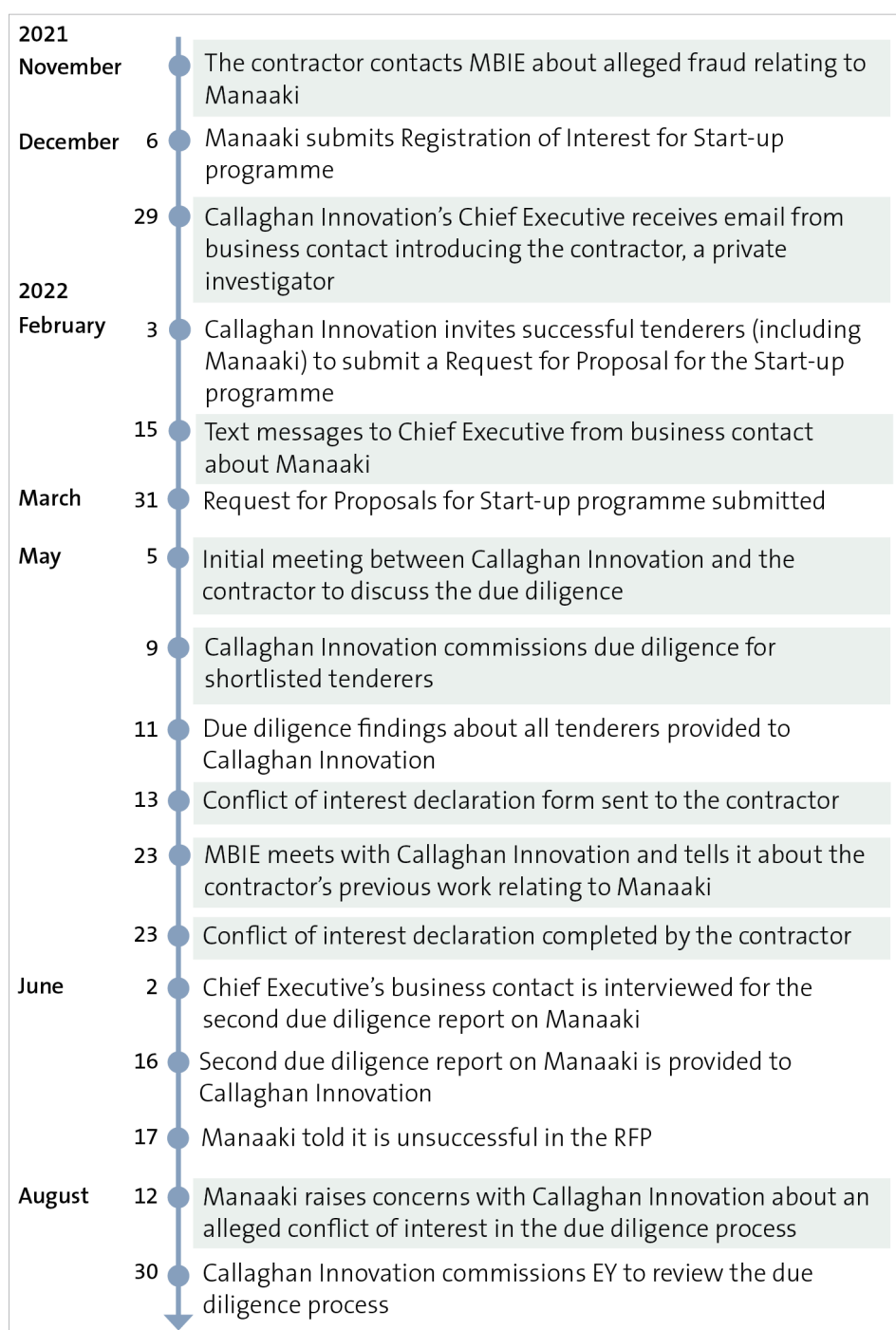
Conflicts of interest and the risk of bias

- 4.1 In this Part, we describe:
- allegations of a conflict of interest in the due diligence process;
 - our view of the potential conflict of interest and risk of bias;
 - how Callaghan Innovation managed conflicts of interest and risks of actual or perceived bias; and
 - our observations of how Callaghan Innovation managed conflicts of interest and risks of bias.
- 4.2 Conflicts of interest can arise in various ways. Public organisations need to make a judgement about whether situations represent a conflict of interest or not. However, the underlying concern is the need for organisations to make decisions impartially and manage the risk, or perception, of bias.
- 4.3 In considering the alleged conflict of interest in the due diligence process, we have considered formal conflicts of interest and risks of actual or perceived bias.
- 4.4 We note that Manaaki complained to the Private Security Personnel Licensing Authority alleging that the contractor was guilty of misconduct in relation to the due diligence investigation on the basis that he had failed to disclose a material conflict of interest. The Authority found there was no misconduct on the facts considered there. We note that the purpose and scope of our inquiry is different from that proceeding.

Allegations of a conflict of interest in the due diligence process

- 4.5 After the procurement was complete, Manaaki raised a concern that a conflict of interest affected Callaghan Innovation's decision-making for the procurement. This allegation arises from work the contractor did for one of the people he interviewed.
- 4.6 Manaaki had also seen correspondence (released under the Official Information Act) that led it to believe that Callaghan Innovation's Chief Executive knew that the contractor had done some work for, or had some information about, We Are Indigo when the Chief Executive suggested that Callaghan Innovation commission the contractor.
- 4.7 This correspondence comprised text messages to the Chief Executive from Mr B (the business contact who had passed on the contractor's contact details to her) referring to the contractor and We Are Indigo.
- 4.8 The Chief Executive told us that she did not know that the contractor had done work that related to Manaaki at the time he was commissioned to do the work.
- 4.9 Figure 4 sets out the stages of the due diligence process that we describe in this Part.

Figure 4
Stages of the due diligence process, from November 2021 to August 2022



The contractor's previous work involving Manaaki

- 4.10 In 2020, We Are Indigo, the parent company of Manaaki, was contracted by the head contractor for MBIE's Digital Boost campaign. We Are Indigo subcontracted aspects of that work to Company A. At the end of the subcontract, there was a dispute between We Are Indigo and Company A about the payment of invoices.
- 4.11 The contractor who did the due diligence work for the Start-up programme told us that Company A hired him to assist with an Official Information Act request to MBIE. After Company A hired a lawyer, the contractor's services were no longer needed.
- 4.12 During this engagement, in late November 2021, the contractor contacted an investigator at MBIE, claiming that he had evidence that We are Indigo might have committed fraud. The allegation concerned differences between amounts paid under the subcontract between We Are Indigo and Company A for the Digital Boost campaign and the amounts paid by MBIE to the head contractor. The contractor told us that he had contacted MBIE because he wanted to know whether MBIE wanted to investigate the matter.
- 4.13 MBIE took no action because it did not consider that it had a role in intervening in a commercial dispute between two subcontracting companies that MBIE had no formal contractual relationship with and because nothing suggested that this was anything more than a normal commercial dispute.
- 4.14 The contractor later interviewed Company A as part of the Start-up programme due diligence process.

Our view of the potential conflict of interest and risk of bias

- 4.15 In our view, the contractor's correspondence with the MBIE investigator suggests that, even before Callaghan Innovation engaged him, the contractor had formed a view that there was evidence of potential fraud in We Are Indigo's dealings with Company A and MBIE.
- 4.16 This raises concerns about whether the contractor had a predetermined view of Manaaki's behaviour and conduct. In turn, this raises questions about whether the contractor came to the engagement with Callaghan Innovation with an open mind. At the very least, it created a perception risk that needed to be carefully managed.
- 4.17 Predetermination is technically not a form of conflict of interest but comes from the common law on bias. The underlying risk with predetermination is that an individual will "taint" a decision or process that they are involved in because they are biased or appear to be biased.

- 4.18 The question to ask is whether a person has previously done or said something that might make people think that they will not fairly consider all the relevant information before forming a view on a matter. The individual needs to ask themselves whether someone looking in from the outside could have reasonable grounds to think they might be biased.

How Callaghan Innovation managed conflicts of interest and risks of actual or perceived bias

- 4.19 We were interested in whether the contractor had disclosed his previous work for Company A and, if so, how Callaghan Innovation managed and documented this.

No interests were declared

- 4.20 When Callaghan Innovation engaged the contractor at the beginning of May 2022, the contractor did not complete a formal conflict of interest declaration even though his contract required disclosure of actual, potential, or perceived conflicts.
- 4.21 The contract described a perceived conflict of interest as one “where other people may reasonably think that a person is compromised”. The definition referred to business interests or obligations where “independence, objectivity, or impartiality can be called into question”.
- 4.22 A member of the procurement team emailed the contractor on 9 May 2022 to say that “you have stated that you have no conflicts of interest related to this activity. Please let me know if that changes at any point throughout the engagement.” At that point, Callaghan Innovation had sent the contractor a list of the shortlisted tenderers, which included Manaaki.
- 4.23 The contractor told us that, once he had decided to interview Company A as part of the due diligence process, he let Callaghan Innovation know that he had previously done work for Company A. The contractor said that he continued with the due diligence because his work for Company A had been completed in December 2021, so he did not consider that there was a conflict of interest.
- 4.24 The procurement team sent the contractor a conflict of interest declaration form to complete on 13 May 2022. The contractor returned the signed form on 23 May 2022, declaring no interests.

What Callaghan Innovation knew about the contractor's previous work for Company A and when

- 4.25 There were several instances throughout the procurement when the contractor's previous work relating to Manaaki was brought to Callaghan Innovation's attention.
- 4.26 We asked Callaghan Innovation's procurement team when it became aware of the contractor's previous work for Company A.
- 4.27 The contractor first met with Callaghan Innovation on 5 May 2022 to discuss the proposed due diligence work. Callaghan Innovation asked the contractor whether he had come across any of the shortlisted tenderers before. We were told that the contractor mentioned working for Company A in a dispute involving a shortlisted tenderer (Manaaki – through its parent company We Are Indigo).
- 4.28 The contractor told Callaghan Innovation that his work with Company A had finished and that there was no longer a conflict of interest. Callaghan Innovation accepted this explanation.
- 4.29 Callaghan Innovation told us that the procurement team found out that Company A had been interviewed for the due diligence only when it received the first due diligence report about Manaaki. Callaghan Innovation asked the contractor why he interviewed Company A. The contractor said that another person he interviewed suggested talking to Company A.
- 4.30 The procurement team did not consider it unusual for an investigator's previous clients to feature in subsequent inquiries and concluded that there was no conflict.
- 4.31 Shortly after Callaghan Innovation received the first due diligence report about Manaaki, Callaghan Innovation's Chief Executive shared the report with MBIE for a separate procurement (see Part 5). After this, MBIE met with Callaghan Innovation on 23 May 2022.
- 4.32 At the meeting, MBIE explained that it was aware of a dispute between We are Indigo (the parent company of Manaaki) and Company A relating to the Digital Boost campaign. MBIE told Callaghan Innovation that the contractor had made allegations of fraud against We are Indigo.
- 4.33 MBIE told us that it expressed concern that the contractor's previous work for Company A presented a potential conflict of interest and that it had asked Callaghan Innovation what Callaghan Innovation's obligations were in terms of due process for the due diligence findings. MBIE suggested telling Manaaki about the allegations so it could have an opportunity to respond.

- 4.34 Callaghan Innovation's procurement team said that MBIE did not tell it anything that it did not already know. Callaghan Innovation said that the contractor had declared that he had no conflict and that there was no evidence to suggest that the contractor's previous work would influence how he collected and provided information.
- 4.35 Shortly after, Callaghan Innovation asked the contractor to do a second round of due diligence on Manaaki.
- 4.36 Callaghan Innovation did not document any of its conversations with the contractor about these matters. Nor did it document its considerations of whether there could be a conflict of interest or risk of bias arising from the contractor's previous work.

Manaaki raised concerns about a conflict of interest with Callaghan Innovation

- 4.37 After the procurement, Manaaki found out who had carried out the due diligence through an Official Information Act request. Manaaki wrote to Callaghan Innovation's current Chief Executive on 12 August 2022 about its concerns with the due diligence process. These concerns included that the contractor had interviewed former clients as part of the due diligence process, that this could be a conflict of interest, and that it raised the issue of bias.
- 4.38 Manaaki's concerns were based on correspondence between one of its employees and Mr B about the contractor's previous work relating to We Are Indigo and a subsequent phone conversation the employee had with the contractor.
- 4.39 Callaghan Innovation then met with the contractor about the concerns that Manaaki had raised. At this meeting, the contractor shared his contract with Company A, which was for 12 months from December 2021.
- 4.40 Even though Callaghan Innovation considered that the contractor's previous work for Company A could be a potential conflict of interest, the contractor maintained that there was no conflict because the work had finished in December 2021.¹⁹
- 4.41 Callaghan Innovation also told us that the contractor had told it that, in his view, he was providing verbatim witness testimony and that his prior experience could not influence the objectivity of this.
- 4.42 After the meeting, Callaghan Innovation discussed the matter internally. It decided that, to address the perceived conflict of interest, it should engage an

¹⁹ The contractor told us that, although the contract ran for 12 months from December 2021, the only work he did under it was completed in December 2021. However, he was still under retainer to Company A when he carried out the due diligence work for Callaghan Innovation.

independent organisation to review how the due diligence had been carried out (see Part 6).

Our observations about how Callaghan Innovation managed conflicts of interest and risks of bias

- 4.43 It is important to manage conflicts of interest carefully, both actual and perceived. This is so the public can have confidence that public organisations are making decisions impartially and for the right reasons and that they are not being influenced by personal interests or other motives. Poorly managing the perception of a conflict of interest or bias can be as damaging as poorly managing an actual conflict of interest.
- 4.44 In procurement, it is important that organisations identify and manage conflicts (including perceived conflicts or risks of bias) so the public can see that public sector procurement is fair and ethical, and that it provides value for money.
- 4.45 The expectation is that all public organisations have policies that help those involved in procurement to identify, notify, and manage conflicts of interest. A public organisation must also show how it uses sound judgement to manage conflicts.

Callaghan Innovation did not properly manage the risk of bias from the contractor's previous work

- 4.46 The contractor having made an allegation of potential fraud about We are Indigo (the parent company of Manaaki) raises questions about his impartiality, or at least perceived impartiality, for the reasons we set out in paragraphs 4.15 to 4.18.
- 4.47 The Executive Summary of the second due diligence report includes an allegation of attempted misappropriation of government funds relating to the dispute between We Are Indigo and Company A. The contractor told us that the allegations set out in the due diligence reports were based on the interviewees' statements. We reviewed all the interview notes and supporting material the contractor provided to us and could not find evidence that an interviewee made this specific allegation.
- 4.48 When findings are based mainly on testimony, there is a risk that the personal experiences of the interviewer or the interviewee affect (or are perceived to affect) the accuracy of judgements. The testimony from Company A described a dispute over a payment, and some documents were provided in support of that. It did not refer to attempted misappropriation of funds.
- 4.49 However, the contractor had previously referred to this dispute in similar terms when contacting an MBIE investigator. MBIE did not consider that any fraud or misappropriation of funds had occurred.

- 4.50 We acknowledge that the contractor was not a decision-maker and that he noted in his report that the allegations put Manaaki in a “show cause” position, which meant that it was for Callaghan Innovation to decide whether it had enough grounds to exclude Manaaki from the procurement.
- 4.51 Callaghan Innovation cited attempted misappropriation of government funds (in relation to Company A) as one of the findings underlying Callaghan Innovation’s decision to exclude Manaaki from the procurement. This conclusion was also later shared and represented as a matter of fact with other government agencies and more widely (because the reports were leaked), without adequate opportunity for Manaaki to respond (see Parts 5 and 6). This was unfair to Manaaki.
- 4.52 Although individuals are responsible for declaring any interests that could present a conflict, the public organisation is responsible for deciding on the appropriate steps to take. It is neither safe nor appropriate to assume that disclosure alone will be enough.
- 4.53 A public organisation is responsible for carefully considering what it needs to do to avoid or mitigate the effects of a conflict of interest or a perception of bias. This includes assessing the risk that the person’s capacity to make decisions lawfully and fairly might be compromised. In making this assessment, a public organisation needs to consider how the situation could appear to an outside observer.²⁰
- 4.54 That the contractor had an ongoing contractual relationship with an organisation that he interviewed as part of the due diligence process was, at a minimum, an interest that the contractor should have disclosed to Callaghan Innovation and that Callaghan Innovation should have managed.
- 4.55 Although Callaghan Innovation told us that it did not know about the contract with Company A until after the procurement, we expected Callaghan Innovation to have sought more information about the contractor’s previous work relating to Manaaki as soon as Callaghan Innovation found out about it.
- 4.56 Once the contractor had identified Company A as an interviewee for the due diligence, Callaghan Innovation should have more actively managed the perception of bias this created.
- 4.57 It is not enough for a public organisation to rely on an individual’s declaration that they have no conflicts of interest when there is information to the contrary. The contractor’s completed conflict of interest declaration form, which disclosed no interests, included a question asking whether the contractor was aware of anything that could give the appearance that he might be biased towards a

²⁰ See Controller and Auditor-General (2020), *Managing conflicts of interest: A guide for the public sector*, at oag.parliament.nz.

particular supplier (for example, where he had expressed strong views about a supplier).

- 4.58 Callaghan Innovation's procurement team accepted the contractor's negative response to this question despite knowing that the contractor had done work for Company A and had made allegations that We Are Indigo had committed fraud to MBIE. Callaghan Innovation also considered it appropriate for the contractor to carry out further due diligence on Manaaki.
- 4.59 Callaghan Innovation appears to have relied on the contractor's view that no conflict of interest arose from his previous work for Company A because there was no ongoing financial relationship and because the contractor said that his methodology meant that any prior experience could not influence the objectivity of his reporting.
- 4.60 In our view, Callaghan Innovation did not adequately consider how the bias, or the perception of bias, that previous work created could impact on the due diligence process. Ultimately, not managing conflicts of interest or perceptions of bias can undermine how the integrity of a procurement is perceived and call into question the integrity of a procurement decision. It can also negatively impact market confidence and undermine trust and confidence in the integrity of the public sector.

Callaghan Innovation did not appropriately document its consideration of interests relevant to the procurement

- 4.61 It is good practice for an organisation to ask its staff and contractors to make a formal declaration that they are free from conflicts of interest or, if not, to get them to describe any circumstance that might create an actual, potential, or perceived conflict of interest or bias. An organisation should keep formal documents so it can show that it identified and managed a specific interest appropriately.
- 4.62 When Callaghan Innovation commissioned the contractor, it did not ask him to complete a formal conflict of interest declaration. This is not good practice nor is it consistent with Callaghan Innovation's conflict of interest policy. Callaghan Innovation should have asked the contractor to make a written declaration before he started work.
- 4.63 Callaghan Innovation told us that it discussed the contractor's previous work on several occasions, but it did not document any of those discussions. This is not good practice and is not consistent with the procurement principles of accountability and transparency.
- 4.64 We expected to see the following documented:
- more careful consideration and documentation of the discussions about the contractor's work for Company A;

- how Callaghan Innovation assessed the risks to the procurement (including the risk of the perception of bias); and
- how Callaghan Innovation proposed to manage the risks to the procurement (or why it chose to discount them).

4.65 Because of the lack of appropriate documentation, Callaghan Innovation cannot show that its processes were consistent with the Procurement Rules and our conflict of interest guidance.

Callaghan Innovation did not disclose other relevant correspondence and relationships

- 4.66 In correspondence between Manaaki and Callaghan Innovation after the procurement, Manaaki raised concerns that Callaghan Innovation was biased against it. Manaaki's Rule 50 procurement complaint in November 2022 raised the correspondence between the Chief Executive and Mr B about the contractor as further evidence of a conflict of interest.
- 4.67 The text messages from Mr B to the Chief Executive referred to the contractor doing work that involved We Are Indigo or having information about it. They also referred to the contractor wanting to engage with Callaghan Innovation's procurement team about this.
- 4.68 Mr B had previously made several social media posts about "bad actors" in the innovation "ecosystem", which Manaaki believed were about it. After Manaaki raised concerns with Callaghan Innovation about Mr B's social media comments, Callaghan Innovation instructed the contractor to interview Mr B as part of the due diligence process. The basis for this was not clear to us, because Mr B had not worked for or with Manaaki.
- 4.69 Callaghan Innovation staff told us that they were not aware of the earlier correspondence about the contractor between the Chief Executive and Mr B. The Chief Executive said that she did not act on the messages at the time. However, the existence of this correspondence has contributed to the perception of bias in the process.
- 4.70 We appreciate that New Zealand is a small country and that organisations and individuals must use their judgement in considering which relationships are relevant and need to be disclosed.
- 4.71 However, in our view, the Chief Executive should have formally disclosed her connection with Mr B and her previous correspondence with him once Mr B became relevant to the procurement. This would have allowed the procurement team to consider whether this posed any risks to the procurement's integrity.

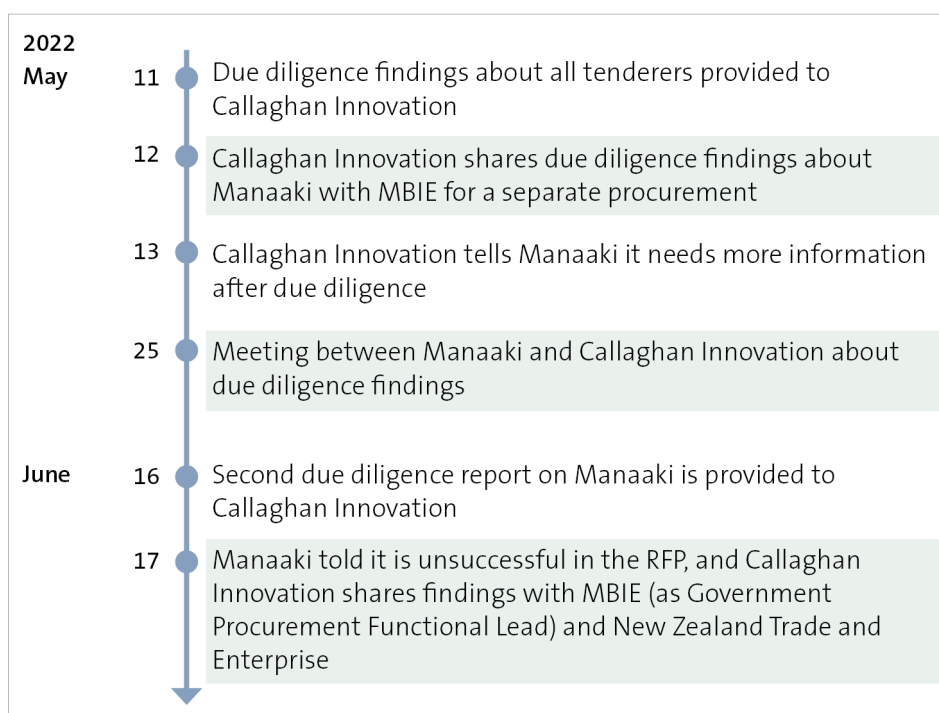
Sharing information with other public organisations

- 5.1 In this Part, we describe:
- Callaghan Innovation sharing due diligence findings about Manaaki with other public organisations;
 - the changing justifications Callaghan Innovation gave for sharing the information; and
 - our observations about Callaghan Innovation sharing information with other public organisations.

Callaghan Innovation shared due diligence findings about Manaaki with other public organisations

- 5.2 During the procurement for the Start-up programme, Callaghan Innovation shared the findings from the due diligence on Manaaki with two other public organisations. This included:
- sharing the first due diligence report with MBIE for a separate procurement; and
 - sending copies of both due diligence reports to:
 - MBIE, as the functional lead for procurement, and
 - New Zealand Trade and Enterprise (NZTE).
- 5.3 Figure 5 shows at what stages of the procurement Callaghan Innovation shared the due diligence reports about Manaaki with other public organisations.

Figure 5
Timeline of events when Callaghan Innovation shared the due diligence reports about Manaaki, May 2022 to June 2022



Callaghan Innovation used the due diligence report about Manaaki for another procurement

- 5.4 In February 2022, Manaaki submitted an RFP to MBIE for the Regional Business Partner Network (the RBP network).²¹ Because Callaghan Innovation jointly funds the RBP network, it also needed to approve the outcome of the RFP.
- 5.5 On 11 May 2022, MBIE sent the tender evaluation report for the RBP network to Callaghan Innovation’s Chief Executive to approve the preferred tenderers. MBIE told us that Manaaki was not successful because it had submitted a non-compliant bid. It also told us that the report proposed that Manaaki be informed that there was support for its proposals. However, unless MBIE could secure further funding, it would be unable to offer Manaaki a contract.
- 5.6 On 12 May, Callaghan Innovation shared the first due diligence report about Manaaki with MBIE, noting that Callaghan Innovation’s due diligence process for the Start-up programme had raised serious concerns about Manaaki. On 13 May,

21 The RBP network provides small-to-medium business owners with access to advice and support through 14 regional growth agencies. The RFP was seeking partners to provide regionally based services as part of a panel of “growth advisors”.

the Chief Executive emailed MBIE recommending that MBIE tell Manaaki that it was unsuccessful in the RBP procurement until further due diligence could be carried out.

- 5.7 The final tender evaluation report for the RBP network did not include support for the proposal from Manaaki. MBIE told Manaaki on 17 May 2022 that it was not successful in the RFP for the RBP network.
- 5.8 Callaghan Innovation's Chief Executive later sent a copy of the second due diligence report to the Head of Small Business at MBIE. The accompanying email from the Chief Executive said that the findings represented an "evidenced and ongoing trend of intolerable behaviours towards founders and start-ups" and that Manaaki would be excluded from the procurement for the Start-up programme.

Callaghan Innovation shared the due diligence findings with the Ministry for Business, Innovation, and Employment and New Zealand Trade and Enterprise

- 5.9 Callaghan Innovation told us that it had felt obliged to escalate concerns about a tenderer who, in its view, had been shown to engage in poor behaviour and who was supplying services throughout the public sector.
- 5.10 On 17 June 2022, after receiving the second due diligence report, Callaghan Innovation's Chief Executive contacted MBIE's Chief Executive. The notes of this conversation stated that Callaghan Innovation's Chief Executive wanted to notify MBIE, as the functional lead for procurement, of the findings. Callaghan Innovation's aim was:
- ... to commence a conversation about how [Callaghan Innovation] could address this instance of unethical behaviour and curb the risk of similar future instances as part of a [joined up] approach.*
- 5.11 The notes recorded that MBIE's Chief Executive suggested that Callaghan Innovation send what it could share to the Deputy Secretary with responsibility for government procurement.
- 5.12 The same day, Callaghan Innovation's Chief Executive sent a copy of both due diligence reports to the Deputy Secretary responsible for government procurement at MBIE and the Chief Executive of NZTE. The reports were sent to NZTE at the request of a Callaghan Innovation Board member who was also on the Board of NZTE.
- 5.13 The accompanying emails said that the findings about Manaaki were "overwhelmingly negative" and repeated the conclusions from the second due diligence report about Manaaki. These included the allegation about attempted misappropriation of government funds (see paragraph 4.47) and other serious allegations about Manaaki's business conduct and behaviour.

- 5.14 The covering email to the Deputy Secretary at MBIE noted that “there are clearly some issues uncovered in due diligence that you may wish to take action on” and that Callaghan Innovation had rejected Manaaki’s proposal in accordance with the Procurement Rules.
- 5.15 MBIE’s Deputy Secretary told us that he did not see the email until some months later and that it was unclear what Callaghan Innovation expected MBIE to do with the information. The Deputy Secretary also said that whatever action MBIE could take would be limited because it does not have a regulatory function for government procurement.
- 5.16 Callaghan Innovation’s Chief Executive had earlier sent Callaghan Innovation Board members a copy of the first due diligence report. One of the Board members (who is also a NZTE Board member) asked whether the due diligence report could be shared with NZTE.
- 5.17 This Board member understood that Manaaki was providing or had provided services to NZTE. This belief was partly mistaken – although Manaaki had previously done work for NZTE, there were no plans for future work, by mutual agreement.
- 5.18 As explained, the Chief Executive then sent copies of both due diligence reports about Manaaki to the Chief Executive of NZTE. The covering email explained that Callaghan Innovation was sharing the reports because “NZTE may have done work with or are considering Manaaki to provide services on behalf of NZTE”.
- 5.19 NZTE’s Chief Executive told us that NZTE had no current or prospective contracts with Manaaki and that NZTE did not take any action after receiving the due diligence reports.
- 5.20 Callaghan Innovation’s procurement team told us that it did not know that the reports had been shared with NZTE until after they had been sent. Although the procurement and legal teams were aware of the phone call with the Chief Executive of MBIE, Callaghan Innovation did not seek any legal advice about what it was able to share, nor did it seek advice about sharing the due diligence reports with NZTE before they were shared.
- 5.21 The chairperson of Callaghan Innovation’s Board told us that the due diligence reports were shared with the Board’s full knowledge and support. The Board said that it understood that the terms in the RFP document allowed Callaghan Innovation to share information with other public organisations. This was not the case.

The changing justifications Callaghan Innovation gave for sharing information

- 5.22 Callaghan Innovation provided three different justifications to NZTE and the two different business units of MBIE for sharing the due diligence reports about Manaaki. They were the following:
- It told NZTE that “all applicants approved due diligence information to be shared across the government”.
 - It told MBIE, as the functional lead for procurement, that “the terms in our RFP enable us to share any due diligence findings across the government”.
 - For the RBP network procurement, it told MBIE that it shared the information “pursuant to an agency information-sharing clause we have in our Founder RFP documentation”.
- 5.23 The Chief Executive, the procurement team, and the Board told us that they understood that the RFP document’s terms allowed Callaghan Innovation to share information with other public organisations.
- 5.24 In October 2022, in response to concerns about the procurement that Manaaki raised, Callaghan Innovation gave another reason for sharing the due diligence reports with other public organisations.
- 5.25 The terms of the Start-up programme procurement provide that obligations about confidential information are subject to requirements imposed by law, including the Official Information Act and parliamentary and constitutional convention.
- 5.26 Callaghan Innovation told Manaaki that, because MBIE is Callaghan Innovation’s monitoring agency, it shared the due diligence reports as part of its reporting process and to comply with the constitutional convention of “no surprises” and the Government Procurement Principles.
- 5.27 In its response to Manaaki’s complaint under Procurement Rule 50 in January 2023, Callaghan Innovation expanded this explanation. It said that it considers that the clauses in the RFP document’s terms about confidential information should be read as ensuring that confidential information is not shared outside of the government or unnecessarily within the government.
- 5.28 Callaghan Innovation said that it considered it appropriate to share information between “closely linked public organisations all of whom have a legitimate interest and/or role in the information and/or processes in question”.

Our observations about Callaghan Innovation sharing this information

Expectations of confidentiality in procurement

- 5.29 Rule 4 of the Procurement Rules states that public organisations must protect suppliers' confidential or commercially sensitive information. Public organisations must not disclose confidential or commercially sensitive information unless:
- *the supplier has already agreed to it in writing, or*
 - *the disclosure is required by law (eg under the Official Information Act 1982), convention or Parliamentary or Cabinet Office practice, or*
 - *it is a limited disclosure expressly notified in a Notice of Procurement to which suppliers have consented by participating in the process.*²²
- 5.30 The Procurement Rules do not define confidential information.
- 5.31 Appendix 2 sets out the RFP terms and conditions relating to confidentiality. Clause 6.17 states that the buyer and respondent will both take reasonable steps to protect each other's confidential information. Neither party should disclose the other party's confidential information to a third party for any purpose other than participating in the RFP process without written consent, except when required by law.
- 5.32 The government's standard RFP terms define confidential information as information that is by its nature confidential or that the recipient knows, or ought to know, is confidential to the provider or the third party that supplied it to the provider. It excludes information that is publicly available or that the recipient acquired entirely independently of the provider.

Callaghan Innovation did not act consistently with the requirement to protect supplier information

- 5.33 Clause 1.6b of the Start-up programme's RFP document confirmed that there were no variations to the government's standard RFP terms. Therefore, no clauses in the Start-up programme RFP document allow information from the due diligence process to be shared with other public organisations without the tenderer's written consent, except for the limited reasons set out in Appendix 2.
- 5.34 In our view, the due diligence information about Manaaki that Callaghan Innovation shared with other public organisations clearly meets the definition of confidential information in the RFP terms.
- 5.35 Although some of the information collected was publicly available, the contractor used the information Manaaki provided in the RFP document to identify people

to interview. The information collected for the due diligence was provided to Callaghan Innovation confidentially and had the potential to affect the reputation and commercial position of Manaaki.

- 5.36 If Callaghan Innovation wanted to be able to share information relating to a tender, it should have clearly communicated to tenderers and those it spoke to as part of the due diligence the circumstances that might lead to information from the due diligence being shared more widely.
- 5.37 For example, Callaghan Innovation has explained that there is considerable overlap between the Start-up programme and the RBP network. However, Callaghan Innovation did not plan for circumstances where it might wish to share information about these two procurements (which were being carried out to similar time frames), how this might affect the due diligence processes for each of the procurements, and what tenderers would need to be told about the potential for information sharing.
- 5.38 In its later correspondence with Manaaki, Callaghan Innovation explained that its reasons for sharing the information were to give effect to the “no surprises” convention. The Cabinet Manual states that officials should be guided by the “no surprises” convention in their relationships with Ministers for issues of significance in their portfolios. Callaghan Innovation interpreted this as applying to sharing between public organisations. We do not accept that this is a valid argument.
- 5.39 We would be surprised if due diligence reports for a procurement were considered the type of information that would be escalated to a Minister through a monitoring department. We consider that any advice on such a matter would be, at most, to provide situational awareness because neither the Minister nor the Ministry is involved in making the decision. We do not accept that this principle applies to sharing information between public organisations generally.
- 5.40 There was no valid reason for sharing the due diligence information with NZTE, because it had no role or legitimate interest in the procurement and no current working relationship with Manaaki. It appears that Callaghan Innovation shared the due diligence findings with NZTE solely because a Board member requested it.
- 5.41 In our view, Callaghan Innovation did not comply with the Procurement Rules when it shared information from the due diligence on Manaaki with other public organisations. We do not accept Callaghan Innovation’s various explanations to justify its decision to share the information.

Callaghan Innovation did not act fairly and transparently when it shared the due diligence information

- 5.42 In our view, Callaghan Innovation's actions in sharing information were not fair or transparent.
- 5.43 Callaghan Innovation had not planned how it would gather information from the due diligence, manage that information, or safely keep it. Nor had it considered the circumstances where it might share the information it collected.
- 5.44 Callaghan Innovation shared unredacted copies of the due diligence reports with different public organisations for different reasons. However, we did not see evidence that Callaghan Innovation considered whether there were valid reasons for sharing the detailed due diligence reports with all recipients.
- 5.45 We expected Callaghan Innovation, when deciding whether to share the information from its procurement, in each instance to:
- seek appropriate advice on sharing this information, including what was reasonable for it to share;
 - consider any risks involved in sharing the information; and
 - consider what processes or checks (if any) it might need to meet its obligations under the Procurement Rules.
- 5.46 Callaghan Innovation did not seek advice about whether the terms of the RFP document allowed it to share information from the due diligence process before deciding to share that information. Callaghan Innovation also did not tell Manaaki that it was going to share the information or ask Manaaki for permission to do so.
- 5.47 Manaaki found out that the information had been shared only from a later Official Information Act response. This was despite Manaaki previously expressing concern to Callaghan Innovation about commercial risk if information got into the public domain.
- 5.48 Callaghan Innovation shared the first due diligence report about Manaaki with MBIE on 11 May 2022. This was before Callaghan Innovation met with Manaaki to discuss the findings of the due diligence. Although it did not change the result of the RBP network procurement for Manaaki, we consider that this further illustrates the lack of natural justice in the process.
- 5.49 When sharing information with others, public organisations need to ensure that the information is accurate and balanced. Callaghan Innovation's emails to other public organisations were strongly worded and included the conclusions drawn in the second due diligence report about Manaaki.

- 5.50 The emails did not make it clear that these “findings” included some details that had not been tested with Manaaki and some conclusions that were not supported by either testimony or exhibits.
- 5.51 As we explained in paragraphs 3.68-3.70, the findings in the due diligence reports were based primarily on testimony. For our inquiry, we reviewed the due diligence reports and the supporting exhibits that the contractor provided to Callaghan Innovation. The supporting exhibits were mainly individual statements that interviewees subsequently confirmed were correct.
- 5.52 Some documents were provided, but there was limited corroborating evidence to support the conclusions reached in the due diligence reports. Further, as we explained in paragraphs 4.47-4.48, the conclusion that there was “attempted misappropriation of government funds” was not supported by the interviewees’ testimony.
- 5.53 Although it is usual to rely on references for due diligence or employment purposes (and testimony is a valid form of evidence), they are by their nature confidential, are done with the full knowledge of those being assessed, and would not usually be shared more widely because they represent an individual’s opinion.
- 5.54 In making its decision about the procurement, Callaghan Innovation was able to consider the information Manaaki had provided both verbally and by email in response to the concerns that had been raised. None of this was included in the due diligence reports. This meant that recipients of the due diligence reports were not given a balanced view of all the information collected for the due diligence.
- 5.55 Callaghan Innovation should have considered whether it needed a higher threshold of evidence to support the information it planned to share with other public organisations, and it should have also considered what information should be shared to ensure that the information was both accurate and fair.
- 5.56 Our view is that it was inappropriate for Callaghan Innovation to share the due diligence reports without adequate context or a reasonable opportunity for Manaaki to respond.

6

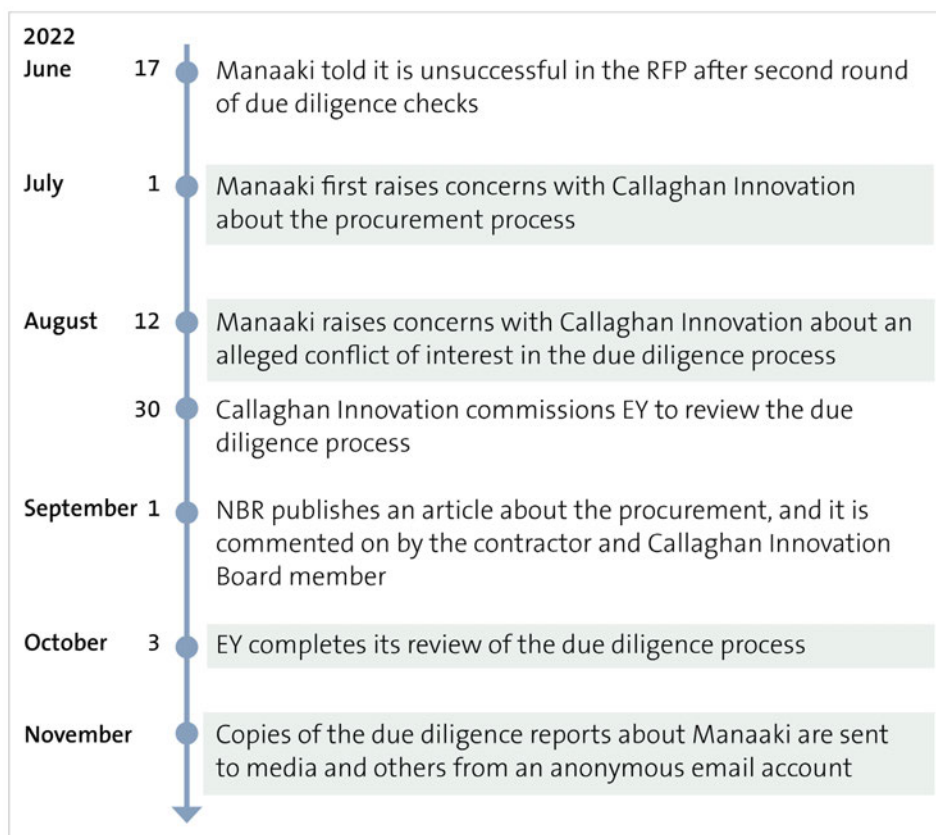
After the procurement

- 6.1 In this Part, we describe:
- what happened after the procurement decision;
 - how Callaghan Innovation dealt with concerns raised about the procurement;
 - the information about the procurement that entered the public domain; and
 - Callaghan Innovation’s planned follow-up actions.

What happened after the procurement decision

- 6.2 Figure 6 sets out a timeline of what happened after Callaghan Innovation made its procurement decision.

Figure 6
Timeline of events after the procurement was complete, from June 2022 to November 2022



- 6.3 When carrying out a procurement, public organisations are required to act fairly, transparently, and reasonably. This obligation does not disappear after a procurement decision has been made.

How Callaghan Innovation dealt with concerns raised about the procurement

- 6.4 At a feedback meeting with Callaghan Innovation to close out the procurement on 1 July 2022, Manaaki became concerned about the reasons that had prompted Callaghan Innovation to exclude it from the procurement. At this point, Manaaki did not know that there was a second due diligence report, nor had Callaghan Innovation put the further concerns described in that report to it for comment.
- 6.5 After that meeting, Manaaki emailed Callaghan Innovation with concerns about the procurement process for the Start-up programme. Manaaki expressed concerns about the process's lack of transparency and lack of natural justice because it had only had a limited opportunity for engagement.
- 6.6 Manaaki also told Callaghan Innovation about claims that certain parties had made against it on social media. Manaaki was concerned that these claims included information that was similar to matters raised in the due diligence process.
- 6.7 Callaghan Innovation replied to the concerns that Manaaki raised by stating that it disagreed with the suggestion it did not carry out the procurement process fairly and consistently with the Procurement Rules. Callaghan Innovation told Manaaki that it did not intend to continue conversations about the procurement.
- 6.8 Throughout July and August 2022, Manaaki was in contact with Callaghan Innovation about Official Information Act requests made by the media and individuals, as well as Official Information Act requests made by Manaaki. Manaaki found out about the two due diligence reports when it was asked for its views on whether the information should be released under the Official Information Act.
- 6.9 On 12 August 2022, Manaaki wrote to the current Chief Executive expressing its concerns that the contractor had been conflicted in his role. Manaaki also raised concerns that the due diligence reports were unbalanced and unfair to Manaaki and that Callaghan Innovation had failed to give Manaaki a reasonable opportunity to respond to the findings.
- 6.10 Manaaki felt that Callaghan Innovation had not given it "the full picture" at the 25 May meeting and that the reasons for excluding Manaaki from the procurement had changed from the reasons given at an earlier meeting.

- 6.11 In response to this letter from Manaaki, Callaghan Innovation rejected the suggestion that there had been a potential conflict of interest or a failure in the procurement process. Callaghan Innovation asked Manaaki to provide evidence to support its allegations about the contractor's conflict of interest, which Manaaki supplied on 17 August 2022.
- 6.12 After receiving information about the conflict of interest from Manaaki and discussing the matter internally, Callaghan Innovation commissioned EY to review the due diligence process.

EY reviewed the due diligence process

- 6.13 Callaghan Innovation consulted its external probity advisor about the scope of the review of the due diligence process. It decided to limit the scope to questions that addressed whether the due diligence work needed to be re-done.
- 6.14 Depending on the review's outcome, Callaghan Innovation would need to consider whether it might need to repeat the due diligence using a different provider. As a result, the scope of the EY review did not specifically consider the impact of the perceived conflict of interest that Manaaki raised.
- 6.15 The current Chief Executive told us that the review was based on the assumption that there was a conflict of interest and that Callaghan Innovation was seeking to understand whether it could still rely on the due diligence reports to support the procurement decision.
- 6.16 Callaghan Innovation told us that this was evidenced by the contract with EY, which stated that Manaaki had raised concerns about an undisclosed potential conflict of interest and that Callaghan Innovation could provide the correspondence from Manaaki about the potential conflict and Manaaki's concerns about the process.
- 6.17 EY told us the review was not based on the assumption of a conflict of interest. EY was aware of the concerns about a potential conflict of interest but was not asked to assess this. EY also confirmed to us that it had talked to Manaaki as part of the review.
- 6.18 The scope of EY's review was limited to specific questions. Figure 7 sets out a summary of EY's responses to those questions.

Figure 7
Summary of EY’s review of Callaghan Innovation’s due diligence process for the Start-up programme

| Question | Summary of EY’s responses |
|---|---|
| <p>To what extent was the due diligence process conducted by the contractor in accordance with generally accepted good practice for undertaking due diligence of this nature in a government procurement process?</p> | <p>The review concluded that the due diligence process was clearly articulated in section 3.8 of the RFP, including the potential use of third parties to help with the due diligence enquiries.</p> <p>The review compared the due diligence process against the Procurement Rules’ <i>Conducting due diligence checks</i>. The due diligence process identified issues through testimonials and references from current and recent customers, through client interviews, and from published articles. These are all valid checks listed in the Procurement Rules’ <i>Conducting due diligence checks</i>, and the issues identified in those checks are enough grounds for recommending the respondent not progress.</p> <p>The review concluded that, accordingly, this was consistent with good practice.</p> |
| <p>To what extent was the contractor fair in selecting and interviewing those they did?</p> | <p>The review concluded that eight of the nine interviewees could be linked to the RFP document for Manaaki, either by being listed as a referee or by being referred by another referee, and that there was a valid audit trail of how the contractor engaged each referee.</p> <p>This was not the case for Mr B (the business contact of the Chief Executive). The review concluded that interviewing Mr B was not aligned with good practice because the interviewee had no business relationship with Manaaki.</p> |
| <p>To what extent did the interviewees freely give their information, and does the contractor’s report fairly represent that information?</p> | <p>Based on a review of the evidence provided, interviewees gave their information freely.</p> <p>The review concluded that the contractor’s report fairly represented the information provided by the interviewees. Interviewees were engaged via phone or email. Statements from interviewees were copied verbatim from the email evidence into the due diligence reports. Where interviews were conducted over the phone, the contractor summarised the discussion in an email and requested that interviewees attested to the accuracy of the summary. This summary was then copied into the due diligence reports.</p> |

| | |
|--|--|
| <p>To what extent are the due diligence findings reported by the contractor sufficiently evidence based?</p> | <p>The review noted that the due diligence findings were predominantly based on testimony. The review also noted that, with testimony-based evidence, there is a risk that the accuracy of the judgements is affected by personal experiences of the interviewer or interviewee.</p> <p>The contractor provided evidence to support each testimony, either an original email or subsequent confirmation by email that a verbal testimony was accurate. Adverse testimony provided by initial interviewees was validated by similar testimony from others. The review concluded that, for this reason, the findings were sufficiently evidence based.</p> <p>The review noted that:</p> <ul style="list-style-type: none"> • it would have expected the context provided by Manaaki in the 25 May 2022 meeting (including that most of the commercial relationships identified in the preliminary report were settled) to form part of the final due diligence report; and • better practice would include consulting Manaaki before both the due diligence reports were finalised. |
| <p>How does the due diligence process conducted on Manaaki compare with other shortlisted respondents?</p> | <p>The review confirmed that the process followed for all six shortlisted respondents was consistent.</p> |

6.19 EY concluded that:

... unsatisfactory results in one aspect of due diligence process (for example, testimonials or references from current or recent customers, client interviews, and published articles) is sufficient to exclude a provider from progressing to the next stage of a contract opportunity per Callaghan Innovation's RFP requirements. This is what has occurred in the situation in question; we identified no significant deficiencies to address in the due diligence process performed by [the contractor] that would have changed the outcome of the process and decisions made because of the process followed.

6.20 The final question posed in the EY review was "What, if any, remedial actions are recommended to address any deficiencies of the due diligence process, that have been revealed as part of this review".

6.21 The review identified that the following would have increased "alignment with good practice":

- Manaaki should have had an opportunity to respond to issues raised before the due diligence reports were finalised.
- Manaaki should have been informed about the additional people who were identified and contacted as part of the due diligence.

- The contractor should have interviewed only those people who had a clear link to the details included in the RFP response from Manaaki.
- Reference checks should have been done with both the contractor and a Callaghan Innovation representative present.
- People involved should have been instructed not to make social media posts about a process that was undergoing review.
- Ideally, just one due diligence process should have been conducted. If a secondary process was required, the approach and what it would or would not include should have been clearly described.

After EY's review was completed

- 6.22 Manaaki did not consider that EY's review resolved its concerns because of the review's limited scope. Manaaki has continued to correspond with Callaghan Innovation, including lodging a formal complaint with Callaghan Innovation under Procurement Rule 50 on 17 November 2022.
- 6.23 This complaint repeated Manaaki's concerns about the perceived conflict of interest and lack of balance in the due diligence reports. Manaaki also raised concerns about information leaks about the procurement. Overall, Manaaki expressed the view that Callaghan Innovation had not acted in good faith.
- 6.24 Callaghan Innovation subsequently told us that it had raised some of the allegations about Manaaki's behaviour made in the due diligence reports as a health and safety concern with Worksafe New Zealand. Worksafe New Zealand decided not to intervene. Callaghan Innovation did not tell Manaaki that it had made this referral.
- 6.25 In a letter to Callaghan Innovation in December 2022, Manaaki explained that Callaghan Innovation's actions in the procurement had put great strain on the personal well-being of its staff and on its business.
- 6.26 Callaghan Innovation responded to the Rule 50 complaint made by Manaaki on 26 January 2023. The response set out its views on the alleged conflict of interest, the purpose of EY's review, and its reasons for sharing the due diligence reports. Callaghan Innovation also explained what it had done to investigate the leak of information to the public.
- 6.27 Callaghan Innovation's response to Manaaki identified areas for improvement. These were:
- identifying where there could be a potential conflict of interest so Callaghan Innovation can take action to address any concerns;
 - including details of any third parties Callaghan Innovation anticipates using to support a procurement process in the tender documents;

- endeavouring to include the opportunity for tenderers to respond to issues raised during a due diligence process before it has been finalised;
- considering, when Callaghan Innovation cannot share a draft report with a tenderer, offering the tenderer the option to review relevant meeting minutes and any formal written responses that address due diligence findings;
- implementing training on appropriate information sharing between public organisations and the obligations of confidentiality;
- making it clearer to tenderers what Callaghan Innovation might do with due diligence findings, including who it might share information with and for what purposes;
- explicitly informing respondents of any intention to share due diligence findings before sharing them; and
- including in any future due diligence reports a disclaimer that the report has been produced for a specific procurement process with predefined evaluation criteria and that readers should complete their own research to obtain a better understanding of the business in question.

6.28 Callaghan Innovation also published a code of conduct to help people working with founders to understand what good behaviour is and how to identify and address unacceptable behaviour. There is a corresponding guide for founders.²³

Our observations about Callaghan Innovation’s response to the concerns raised

6.29 In its responses to Manaaki, Callaghan Innovation maintained that it had complied with the Procurement Rules. It appeared that, initially, Callaghan Innovation was unwilling to engage with the matters that Manaaki had raised.

6.30 For example, when Manaaki first raised the contractor’s potential conflict of interest, Callaghan Innovation asked Manaaki for evidence before it would consider the matter further. This was despite the procurement team knowing about the contractor’s previous work for Company A.

6.31 There has also been a lack of transparency in Callaghan Innovation’s responses to Manaaki. Callaghan Innovation’s procurement team never explained to Manaaki that it knew about the contractor’s previous work for Company A and had decided that it was not a conflict.

6.32 Callaghan Innovation has continued to publicly assert there was no conflict because the contractor did not disclose one, even after the contractor admitted that he was still under retainer with Company A at the time he carried out the due diligence, as explained in paragraphs 4.39-4.40.

- 6.33 In Callaghan Innovation’s response to the Procurement Rule 50 complaint, Callaghan Innovation explained that the conflict “was not known more generally within [Callaghan Innovation] (than the Chief Executive) until Manaaki brought the allegations to our attention in August 2022”. This is not accurate (see paragraphs 4.25-4.36).
- 6.34 There is an inconsistency between how Callaghan Innovation has represented the purpose and scope of EY’s review of the due diligence process to Manaaki when it raised concerns, and the documented scope of the review. EY’s scope of work specifically excluded consideration of the conflict of interest that Manaaki had raised.
- 6.35 However, Callaghan Innovation asserted to Manaaki that “We have not ignored the alleged conflict of interest. We have actually taken it as a given.” This statement is difficult to reconcile with EY’s statement to us that it did not conduct the review on that basis.
- 6.36 By deciding to limit the scope of the EY review, Callaghan Innovation has left the substantive issue of the conflict of interest (and associated concerns about bias) unresolved. This has led to questions about the reliability of the due diligence findings and shows how perceived conflicts of interest can erode trust and confidence in a process.
- 6.37 Callaghan Innovation has asserted to Manaaki and to the public that, based on the findings of EY’s review, its due diligence process was aligned with good practice. In this case, EY assessed generally accepted good practice by reference to the Procurement Rules’ guidelines on conducting due diligence checks. Although these guidelines give practical advice about planning for, and carrying out, due diligence, they should not be read in isolation from the rest of the Procurement Rules.
- 6.38 Using a narrow definition of good practice means, for example, that this aspect of the review does not address (and was not asked to address) whether the due diligence process incorporated other requirements of the Procurement Rules, such as balance and a process that follows natural justice and that is procedurally fair (although EY raised this as an area for improvement). These were specific concerns that Manaaki had raised and were aspects that we have concluded were missing from the due diligence process.
- 6.39 Therefore, without understanding the scope of EY’s review, Callaghan Innovation’s claim that the due diligence was aligned with good practice could be potentially misleading.

- 6.40 In its January 2023 response to the complaint that Manaaki made under Procurement Rule 50, Callaghan Innovation identified some areas for improvement. However, this response and Callaghan Innovation's earlier responses to Manaaki do not appear to consider the consequences for Manaaki of the outcome of the procurement process and the due diligence reports being made public. We discuss this further below.

Information about the procurement entered the public domain

- 6.41 A notable feature of the procurement for the Start-up programme was how much information about the procurement has been in the public domain. We have been told that people in the innovation sector had been raising concerns about unethical behaviour towards founders for some time. From December 2021 on, there had been social media posts referring to "bad actors" in the innovation "ecosystem", which Manaaki believed were aimed at it.
- 6.42 On 7 June 2022, NBR published an article saying that "while other applicants are progressing to the next round of the programme, Manaaki and [We Are Indigo] are facing further questions from [Callaghan Innovation]". The article quoted several people who the contractor had interviewed.
- 6.43 Callaghan Innovation told us that it had contacted the contractor about the article and that the contractor had confirmed that he had not had any contact with NBR. Callaghan Innovation told us that it has no ability to control the actions of other parties.
- 6.44 NBR published a follow-up article on 1 September 2022. Both the contractor and a Callaghan Innovation Board member commented on the article on social media. In his post, the contractor described the due diligence as a "robust investigation, fair and thorough review".
- 6.45 At Callaghan Innovation's request, both comments were taken down. At the same time, the current Chief Executive reminded Callaghan Innovation staff that they should not comment on or "like" any posts about the Start-up programme procurement or its outcome.
- 6.46 On 14 September 2022, one of the interviewees, Mr B, who Manaaki identified as hostile towards it, posted a copy of the statement he had made as part of the due diligence process on social media. There were further media articles in October 2022.
- 6.47 We accept that Callaghan Innovation has no influence over what media choose to report and who chooses to speak to the media. However, Callaghan Innovation staff, the contractor, and a Board member commenting on social media posts

about the procurement indicates a lack of understanding within Callaghan Innovation of its obligations about confidentiality and the obligations it should place on its suppliers.

- 6.48 Once alerted to the issue, Callaghan Innovation took steps to respond to the social media postings and advised those involved about Callaghan Innovation's expectations about public comment on procurement matters.
- 6.49 In November 2022, an anonymous Gmail account sent a redacted copy of the two due diligence reports to an unknown number of people, including the media and our Office.²⁴ This prompted further social media comment.

Callaghan Innovation investigated the unauthorised disclosure of the due diligence reports

- 6.50 When Callaghan Innovation was told that the due diligence reports were in the public domain, it commissioned a review to identify whether the leak came from Callaghan Innovation. Callaghan Innovation told us that, in parallel, it worked with Google to report and shut down the anonymous email account that had sent the reports and worked with Manaaki to report the matter to NetSafe and Cert NZ.
- 6.51 Callaghan Innovation's first step was to do a forensic "hygiene" review of its IT system to see whether anybody had downloaded or forwarded the report.
- 6.52 Callaghan Innovation told us that it found no evidence within its IT systems of anyone at Callaghan Innovation leaking information. However, the review identified that the due diligence reports had been uploaded to the Board's electronic Board papers system. A review of this system revealed that it did not have the functionality to provide an audit trail of documents accessed, downloaded, or forwarded.
- 6.53 Callaghan Innovation then sent a letter to all current and former employees and Board members seeking written assurance that they had not shared confidential information. Most people provided this or separate assurance by email that they had not leaked information.
- 6.54 The current Chief Executive sought advice from KPMG about what further work Callaghan Innovation could do to find out whether the reports were leaked from within Callaghan Innovation. KPMG validated the steps Callaghan Innovation had taken and identified further forensic work that it could do.
- 6.55 However, KPMG advised that it was unlikely that further work would be successful. We were told that, on that basis, the chairperson of the Board decided not to continue pursuing the matter.

²⁴ Greive, Duncan (2022), "The troubling backstory and new legal chaos engulfing We Are Indigo", at thespinoff.co.nz.

- 6.56 It is deeply concerning that the due diligence reports found their way into the public domain. Appropriately maintaining the confidentiality of information provided to public organisations goes to the heart of trust and confidence in procurement processes and the public sector more generally. This is illustrated by our findings in Parts 4 and 5.
- 6.57 No-one has been able to identify where the leaks originated from, but Callaghan Innovation commissioned the reports and was ultimately responsible for their safekeeping.
- 6.58 As we noted in Part 5, Callaghan Innovation decided to share the reports with two other public organisations. We consider that, when it did so, Callaghan Innovation ought to have conveyed the sensitivity of the reports and the need to keep those reports secure. This did not happen.
- 6.59 That said, after the reports were emailed out from the anonymous email account, Callaghan Innovation took reasonable steps to try to identify the source of the leak and to seek assurances from staff that they had not disclosed the reports.

Callaghan Innovation’s planned follow-up actions

- 6.60 In response to an offer to Callaghan Innovation to comment on a draft of this report, Callaghan Innovation advised us that it has reflected on the process and what changes it might make for the future.
- 6.61 In addition to the proposed improvements that it identified in its response to Manaaki’s Rule 50 procurement complaint (see paragraph 6.27), Callaghan Innovation told us about several changes to its systems and processes that it plans to make. We summarise these in paragraphs 6.64-6.72.
- 6.62 We commend Callaghan Innovation for reflecting on what changes to its processes it could make, and we will be interested in how this work progresses.
- 6.63 Callaghan Innovation started making these changes in December 2022, when it released a Founder Code of Conduct that the five Start-up programme providers are required to have in place. This guidance is available for the founder and start-up sector to use more broadly.

Counselling and advice

- 6.64 To support founders, Callaghan Innovation will cover the cost of one-to-one guidance for any start-up founder who has experienced inappropriate behaviour in the start-up sector, regardless of whether they are a Callaghan Innovation customer or a participant in the Start-up programme.

6.65 Specialist external coaches who can help founders to talk about their experience, receive advice, and decide on next steps will provide this confidential service. If a founder requests it, the service can follow a tikanga Māori approach.

6.66 Callaghan Innovation told us that it is planning a free mental-health counselling service delivered by counsellors who have experience working with founders.

Conflict of interest tools and training

6.67 Callaghan Innovation intends to review its approach to conflicts of interest and will commission an external auditor to conduct this review. Callaghan Innovation will implement conflict of interest training for all staff to help identify where perceptions of conflicts of interest might arise.

6.68 Callaghan Innovation has begun using New Zealand Government Procurement's conflict of interest tool, which provides guidance to users (including third parties) to identify whether they have any relevant conflicts of interest.

Procurement review and changes to due diligence processes

6.69 Callaghan Innovation said that it plans to review its procurement processes and seek advice from MBIE and New Zealand Government Procurement on how to do this.

6.70 Callaghan Innovation has implemented a due diligence guide for its procurements.

Refreshing leadership culture and governance charter

6.71 We have been told that senior leadership at Callaghan Innovation has committed to re-emphasise the following to the organisation:

- Callaghan Innovation's senior leadership encourages being presented with a range of views.
- Advice put to the senior leadership should be adequately documented, along with associated consideration of risk.
- The senior leadership's response to the advice should be recorded.

Information sharing and confidentiality

6.72 Callaghan Innovation said that it will work with MBIE as its monitoring agency and the Public Service Commission on information-sharing practices in procurement processes. It said that it hopes that this will lead to a standard for future procurement processes being developed.

Appendix 1

Extracts from the Founder and Start-up Programme Request for Proposal about the due diligence process:

3.8 Due Diligence

Due diligence is the undertaking of activities, additional to assessments against the evaluation criteria, aimed at independently verifying that a Respondent:

- is who they claim to be;
- has the financial ability to deliver; and
- has the necessary capacity and capability to deliver over the life of the contract.

We reserve the right to undertake due diligence relating to any Respondent(s) at any time during the evaluation process (or any negotiation phase). The outcome of this process may be taken into account when determining the final outcome. Examples of due diligence activities we may undertake and sources we may use include:

- accreditation or audit reports
- testimonials or references from current or recent customers
- site visits
- client interviews
- staff CVs
- published articles
- case studies
- current service and contract performance reports
- Companies Office and/or Charities Register checks
- analysis of audited accounts
- credit check
- insurance certificates
- compliance certificates/accreditations
- police checks or security clearances
- personnel security capability checks

Sometimes, Respondents score highly against the evaluation criteria, but due diligence reveals deficiencies in their Proposal, organisation, or experience. In these circumstances, Respondents may not be selected.

To help ensure we obtain a balanced and comprehensive overview of Respondents, we reserve the right to directly engage any past or current contacts of Respondents that we come across in our own dealings (for example, previous clients and other Government Agencies). This may be in addition to any references we request from Respondents as part of the RFP. You agree not to prevent those contacts from engaging with us on any matter relating to this RFP. We may use third parties to help us with our due diligence enquiries.

We may perform variable levels of due diligence on Respondents based on our interpretation of each Respondent's alignment with our requirements. For example, we may undertake additional financial assessments or engage more references for a particular Respondent if we think extra activities are required to get a sufficient understanding of their fit.

We would like to highlight the reasons, as stated in the Government Procurement Rules (2019), that would lead to the exclusion of a Respondent. If any element of our evaluation (including due diligence) reveals any of the following, then we are unlikely to select that Respondent:

- bankruptcy, receivership or liquidation
- making a false declaration (for example, in their tender documents)
- a serious performance issue in a previous contract
- a conviction for a serious crime or offence
- professional misconduct
- an act or omission that adversely reflects on the commercial integrity of the supplier or offends against the Supplier Code of Conduct
- failing to pay taxes, duties or other levies
- a threat to national security or the confidentiality of sensitive government information
- the supplier is a person or organisation designated as terrorists by New Zealand Police
- human rights, employment and/or health and safety violations by the supplier or in the supplier's supply chain
- any matter that materially diminishes an agency's trust and confidence in the supplier.

3.9 Past Experiences with Respondents

Past experiences with Respondents may influence how a Respondent is evaluated against the evaluation criteria or assessed as part of our due diligence. Experiences we (including the evaluation panel) have had with Respondents that constitute first-hand (direct) knowledge may inform our final selection. For example, documented knowledge of poor performance or unethical behaviour.

Any second hand (indirect) knowledge gained about experiences with a Respondent may be taken into account but must firstly be evidenced in order to be considered valid. Personal biases and unsubstantiated rumours do not constitute valid experiences.

Despite track record being only a portion of a Respondent's final score, if we find past experiences with a Respondent constitutes a significant reservation (i.e. see reasons for exclusions above) then we reserve the right not to select that Respondent or continue evaluating that Respondent's response.

Appendix 2

Extracts from the Founder and Start-up Programme Request for Proposal terms and conditions relating to confidentiality, based on the government's standard RFP terms and conditions:

6.6 Third party information

- a. Each Respondent authorises the Buyer to collect additional information, except commercially sensitive pricing information, from any relevant third party (such as a referee or a previous or existing client) and to use that information as part of its evaluation of the Respondent's Proposal.
- b. Each Respondent is to ensure that all referees listed in support of its Proposal agree to provide a reference.
- c. To facilitate discussions between the Buyer and third parties each Respondent waives any confidentiality obligations that would otherwise apply to information held by a third party, with the exception of commercially sensitive pricing information.

6.17 Confidential Information

- a. The Buyer and Respondent will each take reasonable steps to protect Confidential Information and, subject to paragraph 6.17.c. and without limiting any confidentiality undertaking agreed between them, will not disclose Confidential Information to a third party without the other's prior written consent.
- b. The Buyer and Respondent may each disclose Confidential Information to any person who is directly involved in the RFP process on its behalf, such as officers, employees, consultants, contractors, professional advisors, evaluation panel members, partners, principals or directors, but only for the purpose of participating in the RFP.
- c. Respondents acknowledge that the Buyer's obligations under paragraph 6.17.a. are subject to requirements imposed by the Official Information Act 1982 (OIA), the Privacy Act 1993, parliamentary and constitutional convention and any other obligations imposed by law. The Buyer will not be in breach of its obligations if Confidential Information is disclosed by the Buyer to the appropriate authority because of suspected collusive or anti-competitive tendering behaviour. Where the Buyer receives an OIA request that relates to a Respondent's Confidential Information the Buyer will consult with the Respondent and may ask the Respondent to explain why the information is considered by the Respondent to be confidential or commercially sensitive.

6.18 Confidentiality of RFP information

- a. For the duration of the RFP, to the date of the announcement of the Successful Respondent, or the end of the RFP process, the Respondent agrees to keep the RFP strictly confidential and not make any public statement to any third party in relation to any aspect of the RFP, the RFP process or the award of any Contract without the Buyer's prior written consent.
- b. A Respondent may disclose RFP information to any person described in paragraph 6.17.b. but only for the purpose of participating in the RFP. The Respondent must take reasonable steps to ensure that such recipients do not disclose Confidential Information to any other person or use Confidential Information for any purpose other than responding to the RFP.

Definitions: Confidential information

Information that:

- a. is by its nature confidential
- b. is marked by either the Buyer or a Respondent as 'confidential', 'commercially sensitive', 'sensitive', 'in confidence', 'top secret', 'secret', 'classified' and/or 'restricted'
- c. is provided by the Buyer, a Respondent, or a third party in confidence
- d. the Buyer or a Respondent knows, or ought to know, is confidential.

Confidential information does not cover information that is in the public domain through no fault of either the Buyer or a Respondent.

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