



Procurement and Contract Management

Report for the Resources O&S Committee

1 Purpose

- 1.1 Since its creation in 2018, the Resources O&S Committee has encountered a number of issues in relation to how contracts are procured and managed in the council.
- 1.2 This note sets out some of the concerns raised over that time, and asks the Committee to consider what, if any, next steps it wishes to take.

2 Matters Raised

- 2.1 The process for procuring goods and services is set out in Part D3 of the Constitution – Procurement Governance Arrangements. Also relevant to this discussion is Part D2 – Rules Relating to Contracts (both parts are attached to this note).
- 2.2 Whilst the routes for both contracts and procurement are set out in these pages, the Committee has identified some difficulties with the actions taken along those routes. These are summarised below:
 - **Taking account of policy change:** at the last meeting an item of urgent business was raised in relation to the publication of an OJEU notice for the procurement of waste treatment services. The concern was that the delegated authority to commence procurement activity had been given in a February 2018 Cabinet report, more than a year before the council had declared a climate emergency that will no doubt necessitate changes to the Council's waste and energy policy. The OJEU notice reflects a tender scenario based on the existing waste and energy policy. This raises questions about how the procurement procedure ensures account is taken of any necessary changes in council policy.
 - **Clarity on the requirements of the procurement arrangements and whether these are being followed:** the call-in meeting on 10th February discussed the decision to enter into Single Contractor Negotiations for the provision of a Clean Air Zone mitigations application and case management system. This raised questions about whether the arrangements for procurement set out in Part D3 had been followed, and some confusion about what requirements applied.
 - **Timeliness of procurement decisions:** this has arisen multiple times, including the re-procurement of the waste management contract (subject of a call-in by this committee in January 2019); the emergency decision taken in December 2019 in relation to the National Express bus depot relocation; and was in issue in the Clean Air Zone mitigations application referred above.



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In each of these cases, the need for a quick decision overrode other good governance or transparency requirements. It is unclear why this is a recurring issue and is perhaps related more to contract management rather than procurement processes but does raise questions regarding how service areas and procurement work together to ensure compliance.

- 2.3 Members are asked to consider how they wish to take forward these matters. One option is to refer Constitution matters to Co-ordinating O&S Committee for them to make recommendations to the Executive. For example, the Committee could consider recommendations around delegated decisions to ensure that they are reviewed after a certain period, or are time-limited, to ensure any subsequent policy, budget or statutory changes are taken into account.

D2. RULES RELATING TO CONTRACTS

2.1 Introduction

- i. These Rules shall be regarded as Standing Orders of the Council for the purposes of Local Government Act 1972.
- ii. These amended Standing Orders apply to all new procurement processes which are commenced after **10 September 2019**.

2.2 Application and Interpretation

In these rules:

“Authorised Officer” means the officer to whom the function has been delegated in accordance with delegations or sub-delegations set out in the Constitution or appendices.

“Authorised Recipient” means the officer responsible for the receipt of tenders and quotations.

“Best Value” means the Council's duty under Section 3 Local Government Act 1999.

“Building Regulation Authority” means a local authority as defined by Section 126(1) Building Act 1984.

“Candidate” means a contractor that has sought an invitation or has been invited to take part in a restricted procedure, a competitive procedure with negotiation, a negotiated procedure without prior publication, a competitive dialogue or an innovation partnership.

“Closing Date” means the time and date specified in the invitation to tender, quote or negotiate (or any later date that is notified to all persons invited to tender, submit a quote or negotiate where such notification is provided at least 24 hours before the previous Closing Date).

“Competitive Dialogue” and **“Competitive Procedure with Negotiation”** mean negotiations carried out in accordance with Public Procurement legislation.

“Contract” means a contract for supplies, services, or for the execution of any works and also includes a Framework Agreement and Dynamic Purchasing System. It excludes contracts for the acquisition or disposal of an interest in land, and the grant of a licence.

“Contractor” means any person seeking to enter into a contract with the Council.

“Decision Maker” means the Council, Cabinet, Cabinet Member, Committee or Sub-Committee or Authorised Officer to whom a function has been delegated in accordance with the Council's Constitution (Part E or the Directorate Sub-Delegations).

“Estimated Total Cost” means the aggregate total cost of the supplies or services to be provided or works to be performed under a contract, including any form of option, estimated prior to its procurement.

“Public Procurement Legislation” means the Public Contract Regulations 2015 as amended or Concession Contract Regulations 2016 as appropriate or any other successor legislation.

“Procurement Threshold” means the published financial threshold applying to in scope supplies, services and works contracts and concession contracts as identified in the Public Procurement Legislation.

“Framework Agreement” means a contract concluded in accordance with the Public Procurement Legislation by the Council or by another contracting authority, which establishes the terms under which a contractor will enter into contracts with a contracting authority covered by the scope of the agreement in the period during which the framework agreement applies.

“Innovation Partnership” means a procedure carried out in accordance with regulation 31 of the Public Contract Regulations 2015 or any successor legislation, in which the aim is the development of an innovative product, service or works, not already available on the market.

“LEP Authority” means the following local authorities:

Solihull MBC, East Staffordshire Borough Council, Lichfield Borough Council, Tamworth Borough Council, Bromsgrove District Council and Cannock Chase District Council and any other local authority (or authorities) that may join the Greater Birmingham & Solihull Local Enterprise Partnership.

“Negotiated Contracts” means the process undertaken by Officers in order to award contracts as set out in Section 2.5.

“Open Procedure” means a procedure leading to the award of a contract where any interested contractor may submit a tender in response to a contract notice.

“Restricted Procedure” means a procedure leading to the award of a contract where any interested contractor may submit an expression of interest in response to a contract notice, but only candidates selected by the Council will be invited to submit tenders.

“Unforeseen Priority” means a situation where there is an overwhelming and immovable requirement to complete an item of work, such requirement could not have been foreseen within sufficient time to have allowed a competitive procurement, and the adverse consequences of delaying the completion of such work significantly outweigh the consequences of not securing effective competition. This is provided that the overwhelming and immovable requirement is not attributable to the Council.

2.3 Compliance

- i. Every contract made by the Council shall comply with these Rules and be carried out in a fair, open and transparent manner that treats all contractors equally and without discrimination, provided that this does not include contracts for the appointment of barristers, or legal advice where in the opinion of the City Solicitor urgent advice is needed to protect the interests of the council.
- ii. Instruction of any legal firm or barrister must be approved by the City Solicitor.

Subdivision of Contracts

- iii. No contract shall be subdivided into smaller contracts so as to avoid compliance with Standing Orders.

Value Added Tax (VAT)

- iv. All figures in Standing Orders are net of VAT.

Exemption

- v. Exemption from any Standing Order may be authorised by the Decision Maker PROVIDED THAT the Decision Maker is satisfied that the exemption is justified by special circumstances and the Decision Maker records in writing the ground(s) for being so satisfied as part of that decision.

2.4 Quotations

Low Cost Quotations

- i. Where the estimated total cost of a contract does not exceed £10,000 no contract shall be entered into unless three written quotations have been secured from contractors listed on the finditinbirmingham.com database who the Authorised Recipient considers are suitable.¹ If the Authorised Recipient is unable to secure the submission of 3 written quotations then the Authorised Recipient shall record the reasons and proceed with a single quotation, subject to the Decision Maker's agreement being obtained pursuant to vi

High Cost Quotations

- ii. Where the estimated total cost of a contract exceeds £10,000 but is below the Procurement Threshold no contract shall be entered into unless either:
- The contract has been advertised on finditinbirmingham.com² and a minimum of seven calendar days allowed for the submission of quotations and at least three quotations have been submitted. (Due regard should be given to the complexity of the proposed contract and the time required for drafting a tender response when setting the time limit for bidding). If at the end of the advertising period less than 3 quotations have been submitted then the Authorised Recipient shall record the reasons and proceed with a single quotation, subject to the Decision Maker's agreement being obtained pursuant to vi.; or
 - Where there is a suitable Framework Agreement, then quotations should be sought by either a mini-competition or direct award in accordance with the call-off rules established for that Framework Agreement.
 - Where the estimated total cost of a contract exceeds £25,000 the contract has also to be advertised on www.gov.uk/contracts-finder.

Building Regulation Authorities and Local Enterprise Partnership (LEP) Authorities

- iii. Where the proposed contract is for building consultancy work with a Building Regulation Authority or for services to be undertaken by a LEP Authority and the estimated total cost

¹ If the contract delivery is outside the West Midlands, the procuring officer shall determine the means of advertising in order to secure the appropriate number of quotations to achieve value for money.

² As above

of the contract does not exceed the Procurement Threshold the Council shall be entitled to enter into the contract with the Building Regulation Authority or the LEP Authority as appropriate without first seeking quotations or advertising the contract on finditinbirmingham.com.

Tenders

- iv. No contract whose estimated total cost exceeds the Procurement Threshold shall be entered into unless tenders have been invited in accordance with either the open or restricted procedures, or one of the negotiated contracts or framework agreement procedures set out below and carried out in accordance with Public Procurement Legislation.

Pre Estimate of Tender Sum

- v. No tender shall be invited for a contract unless:
- an authorised officer has prepared an estimate in writing of the probable expense of the supplies or services or of executing the works; and
 - in the case of a tender for the execution of any works, an authorised officer has prepared an estimate of the annual running costs after completion.

Publication of Notices

- vi. Contracts shall be advertised and awarded in accordance with Public Procurement Legislation through the Council's e-tendering provider. Contract notices shall also be published on www.finditinbirmingham.com.³

2.5 Negotiated Contracts

Multiple Contractor Negotiations (MCN)

- i. A contract may be negotiated and concluded with three or more prospective contractors where the City Solicitor (or Assistant Director, Legal), the Chief Finance Officer (or the Assistant Director Development and Commercial Finance) has certified in writing prior to the commencement of such negotiations that the method of procurement:
- Satisfies Best Value;
 - (Where the value exceeds the Procurement threshold) is in accordance with the Procurement Directives; and
 - Contractors would be unlikely to submit an unqualified tender or quotation.
- ii. Where such authorisation has been issued, the Quotations and Tenders sections above (except for Pre-estimate of Tender Sum) and the Submission of Quotations and Tenders section below shall not apply to that contract.
- iii. MCNs are not to be used as a means to extend contracts that have failed to be re-procured in sufficient time.

³ See footnote 1 above

Single Contractor Negotiations (SCN)

- iv. A contract may be negotiated and concluded with a single contractor where the City Solicitor (or Assistant Director, Legal) and the Chief Finance Officer (or the Assistant Director Development and Commercial Finance) has certified in writing prior to the commencement of such negotiations that the method of procurement:
 - Where the value exceeds the Procurement Threshold) is in accordance with Public Procurement Legislation;
 - As a result of a market investigation there is only one contractor that can meet the Council's requirements for that contract; or
 - There is an unforeseen priority
- v. Where such authorisation has been issued, the Quotations and Tenders sections above (except for Pre-estimate of Tender Sum) and Submission of Quotations and Tenders section below shall not apply to that contract.
- vi. SCNs are not to routinely be used as a means to award or extend contracts that have failed to be re-procured in sufficient time.
- vii. The duration of contracts awarded under SCNs should be proportionate to the subject matter of the contract.

Competitive Dialogue, Competitive Procedure with Negotiation or Innovation Partnership

- viii. A contract may be the subject of Competitive Dialogue, Competitive Procedure with Negotiation or Innovation Partnership where the City Solicitor, the Chief Finance Officer, or the Assistant Director Development and Commercial Finance has agreed the Procurement Strategy report prior to the publication of a contract notice, that use of an alternative procurement procedure will not satisfactorily allow the award of contract.
- ix. Where such authorisation has been issued, the Quotations and Tenders sections above (except for Pre-estimate of Tender Sum) and Submission of Quotations and Tenders section below shall not apply to that contract.

2.6 Framework Agreements

Single Contractor Framework Agreement

- i. Where a single contractor has entered into a contract with the Council based on a Framework Agreement established by the Council or by a Contracting Authority that has included the Council within the scope of their Agreement, the issue of individual orders for work within the scope of that contract shall not require further action under Standing Orders.

Multiple Contractor Framework Agreements

- ii. When more than one contractor has entered into a Framework Agreement with the Council then the issue of orders shall be in accordance with any allocation rules agreed with the Decision Maker on the award of the contract. Where the rules require opening

up competition between the Framework Contractors, then a report shall be issued to the Decision Maker under the Evaluation and Award section below setting out the reason for the award to the particular contractor and how the price payable by the Council has been reached.

- iii. Contracts to be concluded by a call off from a Framework Agreement established by another Contracting Authority shall be carried out in accordance with the rules for the operation of that Framework Agreement; ensuring that the scope covers the Council as a Contracting Authority to which the framework is open.

Dynamic Purchasing Systems

- iv. Dynamic purchasing systems shall be operated as a completely electronic process, and shall be open throughout the period of validity of the purchasing system to any economic operator that satisfies the selection criteria. In order to procure under a dynamic purchasing system, the rules of the Restricted Procedure shall be followed in accordance with the Public Procurement Legislation.

2.7 Submission of Quotations and Tenders

Method of Submission

- i. All invitations to tender or quote shall state that no tender or quotation shall be considered unless it is submitted in accordance with the requirements described in the instructions for tendering or submitting quotations.

Closing Date

- ii. No tender or quotation received after the closing date shall be accepted or considered.

Record

- iii. The authorised recipient shall be responsible for ensuring that there is an accurate record of the receipt of tenders and quotations.

2.8 Evaluation and Award

Evaluation principles

- i. All invitations to tender or to submit a quotation shall specify the selection and award criteria.

Award Report

- ii. A written report on the evaluation of tenders shall be issued to the decision maker, following any procurement in accordance with the Tenders, Negotiated Contracts or Framework Agreements sections above including the opening up of competition when calling off from a framework agreement and when establishing a dynamic purchasing system.
- iii. Award reports shall include at least the following:

- a) A brief summary setting out the subject matter of the report and the desired outcomes;
- b) results of the qualitative selection and the reasons for selection or rejection of contractors;
- c) and additionally (where appropriate):
 - The reasons for selection or rejection of Candidates;
 - The reasons for the rejection of tenders found to be abnormally low;
 - Any delegations sought to take up options to extend the contract subject to satisfactory performance and budget availability;
 - The pre-estimate of expenditure or the total value of orders; and
 - The rules for the allocation of orders.

Contract Award

- iv. Following the authorisation of the award report, all tenderers shall be notified in writing of the outcome, subject to the requirements of the Public Procurement Legislation regarding standstill periods. Debrief and publication of the award notice(s) shall be complied with.

2.9 Content of Contracts

- i. Every contract shall be in writing and shall contain clauses which are currently approved by the City Solicitor which address:
 - a) The prevention of corruption;
 - b) Equal opportunities;
 - c) The Council's procurement policy framework for jobs and skills where applicable;
 - d) The Council's Birmingham Business Charter for Social Responsibility where applicable; and
 - e) Where the contract exceeds the Procurement Threshold; the contract shall contain clauses reflecting obligations under Public Procurement Legislation.

2.10 Execution of Contracts

Sealing

- i. Every works contract which exceeds £250,000 in value, every contract for supplies or services which exceeds £1,000,000 in value and all Framework Agreements irrespective of their value shall be sealed with the Common Seal of the Council and shall be executed by the contractor as a Deed.

Signing

- ii. Every contract shall be signed on behalf of the Council either by a senior lawyer who is duly authorised by the Council or an authorised officer.

Members

- iii. No Member of the Council shall enter either orally or in writing into any contract on the Council's behalf.

D3. PROCUREMENT GOVERNANCE ARRANGEMENTS

3.1 Scope

- i. This sets out the governance arrangements for approval and award of contracts and for the exercise of the chief officer delegations where the supplies, materials, services to be purchased or the works to be executed are between the Procurement Threshold and £10,000,000 in value. Chief Officers/Directors will put in place a scheme of sub-delegations to other officers and these will be published on the Council's webpage.
- ii. These figures refer to the Council's expenditure only, notwithstanding that the Council may permit its Framework Agreements to be used by other contracting authorities.
- iii. Where the estimated value of a contract is £10,000,000 or above, Cabinet is required to approve the strategy report and the contract award. Where the estimated value of a contract is under £10,000,000, the contract award decision shall normally be delegated to Chief Officers/Directors in accordance with the Procurement Governance Arrangements; provided that the [tolerances](#) below are not exceeded, in which case such contract award decision will be made jointly by the Cabinet Member – Finances and Resources together with the relevant Chief Officer. Where it is likely that the award of the contract will result in staff employed by the Council transferring to the successful contractor under TUPE, in which case the decision must be made by Cabinet.

3.2 Sounding out Cabinet – Planned Procurement Activities Report (PPAR)

- i. The Assistant Director of Development and Commercial Finance shall present a monthly report to Cabinet plus a copy to the Resources Overview and Scrutiny Committee of all relevant planned procurement activity ("Planned Procurement Activities Report") over the following quarter.
- ii. The report is in header form listing the goods or services with estimated timescale, together with a briefing note. Estimated contract values may in most cases be exempt from public disclosure subject to the public interest test in accordance with Schedule 12A of the Local Government Act 1972.⁴ This report is:
 - a) To inform Cabinet and the Resources Overview & Scrutiny Committee of planned procurement activities over the following quarter.
 - b) To act as a sounding for Members for the planned activities where decisions are delegated to Chief Officers/Directors;
 - c) For Cabinet to identify any sensitivities or requirements that necessitate a procurement report to be presented to Cabinet for an executive decision prior to starting the procurement rather than delegating the decision to Chief Officers/Directors.

⁴ Further guidance on exempt information can be found in Part C2 Access to Information

- iii. Any planned procurements can, at the discretion of Cabinet, be brought back to Cabinet for an Executive decision.

3.3 Strategy Report

- i. Prior to commencing a procurement process and the issue of tender documents, a brief outline of the proposed activity ("Strategy Report") will be prepared by the Directorate Chief Officer, or if the contract is designed to service two or more Directorates, the relevant Head of Category from within Corporate Procurement ("**the Contract Owner**") seeking approval from:
- Finance - to validate that the anticipated benefits can be realised and to confirm the budget is available;
 - Legal Services - to confirm the proposal including the method of procurement is within the Council's powers.; and
 - Corporate Procurement Services - to confirm that the strategy demonstrates the best form of procurement, is likely to secure effective competition and deliver best value and approve the market engagement strategy.
 - The Contract Owner shall gain approval to the content of the Strategy Report from City Solicitor, Chief Finance Officer and Assistant Director of Development and Commercial Finance (or their delegates) by email. It is required that the same, final version of the Strategy Report having been seen and authorised by all parties.

3.4 Tolerances for operation

- i. If a project within the Planned Procurement Activities Report is not approved for the goods or services required, then an Executive decision will need to be made by Cabinet (or the relevant Cabinet Member in consultation with a Chief Officer if it is within the appropriate financial limits).
- ii. Also if:
- the estimated total value of the contract exceeds the figure stated in the Planned Procurement Activities Report by 20% or £500,000 (whichever is the lower), or exceeds £10,000,000;
 - the proposed length of the contract exceeds by more than 12 months the term stated in the Planned Procurement Activities Report;
 - there is a material change to the scope of the contract as set out in the Planned Procurement Activities Report;

the Executive decision on contract award will be delegated to the Cabinet Member – Finance and Resources acting with the relevant Chief Officer.

3.5 Contract Award Report

- i. At the end of the tender and to enable a contract award to be made and an award notice to be published, an award report shall be produced in accordance with the Public Procurement Legislation for consideration by the relevant Decision Maker in order to authorise approval ("Contract Award Report").

- ii. The Contract Award Report should make clear where authorisation is being sought to delegate to the appropriate Chief Officer the taking up of the option to extend, in whole or in part, by written notice to the contractor(s), subject to satisfactory performance and funding availability. See Award Reports section D2.8 iii above for the minimum content of Award Reports.
- iii. The Contract Award Report shall be approved by the City Solicitor, the Chief Finance Officer and the Assistant Director Development and Commercial Finance (or their delegates); the same final version of the Contract Award Report having been seen and authorised by all parties.

3.6 Combined Strategy and Contract Award report

- i. Where the proposed procurement route is the use of (or “call off” from) another Contracting Authority’s Framework Agreement, a combined strategy and award report may be presented to the relevant Decision Maker provided that, in addition to the applicable requirements of the Framework and Award sections above, the report contains an options appraisal stating:
 - The justification for use of the framework agreement;
 - How the Council’s policies (including the Social Value and Living Wage Policies) will be addressed; and
 - The reason for the award to the particular contractor and how the price payable by the Council has been reached.
 - See Award Reports section D2.8 iii above for the minimum content of Award Reports.

3.7 Contract Extension Report

- i. A Contract Extension Report may authorise an extension to a contract where a contract has expired and a replacement contract has not been procured in time, this delay is not attributable to the actions of the Council, and there is no option outstanding to extend the contract provided that:
 - The City Solicitor, the Chief Finance Officer and the Assistant Director Development and Commercial Finance (or their delegates) are satisfied that there is no viable alternative solution, having regard to the Public Procurement Legislation;
 - The value of the extension does not exceed £500,000;
 - Where the contract exceeds the Procurement Threshold, due regard is to be given to the circumstances in which a modification of a contract or a framework agreement is permitted under the Public Procurement Legislation.
 - The contract conditions are similar to those of the contract which has expired; and
 - There is no change to the specification to that contained in the contract which has expired.
- ii. Such Extension Report shall set out the business case and appraisal of options, the outcome of any negotiations with the contractor and the reasons why it was not practicable to complete a procurement process and award a contract prior to the expiry of the current contract.

3.8 Framework agreements

- i. Where the award of a framework agreement has been approved by a Cabinet Member with a Chief Officer, or by a Chief Officer in accordance with the Procurement Governance Arrangements then Chief Officers may issue further orders under the framework agreement provided that they comply with the scope of the agreement and Framework Limits.

3.9 Record of decisions

- i. The Assistant Director Development and Commercial Finance shall:
 - Maintain a record of all decisions made by Chief Officers/Directors ; and
 - Report on a quarterly basis to Cabinet on all decisions taken by Chief Officers/Directors during the previous quarter;

to which these Procurement Governance Arrangements apply. The report will be in header form listing the contract values, timescales and goods, services or works.

3.10 Compliance

- ii. This process shall be consistently applied across the Council and directorates should not need to add any additional processes. The relevant Chief Officer is responsible for ensuring these Procurement Governance Arrangements are followed and all approvals required are in place before any contract is awarded.