

Procurement Guidance for Members

As a local authority, the Council is subject to legislation derived from EU law that governs how procurements of a certain value must be carried out. The principles that underpin this legislation are transparency, proportionality and equal treatment of 'economic operators'.

In addition, the Council is specifically required to ensure that it does not design its procurements in a way that artificially narrows competition by unduly favouring or disadvantaging certain economic operators. It is therefore important that the Council follows the requirements of the regulations carefully and in doing so, interprets them in a manner that respects the underlying principles of the legislation.

One of the ways in which the regulations ensure that the principles are met is by requiring local authorities to take measures to prevent, identify and remedy conflicts of interest arising in the conduct of procurements. It is therefore important that anybody involved in a procurement process signs a declaration of interests form.

This note sets out key aspects of the procurement process and how the Council follows this process in procuring contracts that are the subject of EU regulation. For contracts that are not covered by EU regulation, officers still have to follow the Council's Code of Procurement Practice.

Decision to Procure

The decision to procure a contract, whether that be goods, services or works (or a mixture of more than one), will usually be taken by the Executive following a recommendation from officers by way of a report for a specific project.

Whether or not that contract will be subject to EU regulation depends on the type of contract as follows:

- Goods and Services Contract – a simple supply of goods and/or services will be subject to the Public Contract Regulations 2015 if it is of a value of £164,176 or above;
- Works Contract – a contract for construction or other works will be subject to the Public Contract Regulations 2015 if it is of a value of £4,104,394 or above;
- 'Light Touch Services' – some social and specific service contracts are classed as 'light touch' under the Public Contract Regulations 2015 (for example, Leisure Services). A contract that is light touch will only be subject to the Public Contract Regulations 2015 if it is of a value of £589,148 or above;
- Concession Contract – a contract for the provision of services where the consideration consists either solely of the right to exploit the services (i.e. to make money from third parties) or in that right together with payment (e.g. management fee) will be subject to the Concession Contracts Regulations 2016 if it is of a value of £4,104,394 or above.

Officers will usually give an indication in the Executive report as to whether the contract would be subject to one of the above procurement regimes, following advice from the Procurement Manager and/or Legal Services.

Where the Executive approves the project, it will normally delegate its implementation to specific officers in consultation with the relevant portfolio holders, which usually includes

delegation to undertake a procurement process, select a preferred provider via that process and enter into the necessary legal agreements with that provider.

Choosing a Procurement Procedure

Before commencing the procurement, officers will need to determine which procurement procedure would be most appropriate to use depending on the nature of the project. That decision will often be taken following advice from the Procurement Manager and/or Legal Services.

Sometimes officers will be in a position to give an indication in the Executive report which procedure they are expecting to follow, however, this may not always be the case and can be subject to change, if in scoping the project; officers reach the conclusion that a different procedure would be more appropriate.

The available procedures are as follows:

- Open – anybody can submit a tender if they wish to, without the need to satisfy any ‘pre-qualification criteria’;
- Restricted – only those bidders that meet the ‘pre-qualification criteria’ can submit a tender;
- Competitive with Negotiation – this is similar to the restricted procedure but there is an additional optional stage (or stages) for negotiating with bidders after they have submitted their initial tenders, in order to refine the Council’s requirements to secure more beneficial final tenders;
- Competitive Dialogue – bidders are asked to provide a proposal in response to a high level specification and then through one or more dialogue meetings, the Council and the bidders refine those proposals to result in a final tender that meets the Council’s needs;
- ‘Free choice’ – for light touch and concession contracts the Council is free to design its own procedure provided that some minimum requirements are met.

Competitive with negotiation and competitive dialogue can only be used in certain circumstances, including where the Council’s needs can’t be met without adapting a readily available solution and/or the contract includes design or innovative solutions (e.g. the Creative Quarter procurement). Where the Council has free choice to choose a procedure it can follow a process that is the same or similar to these without providing such justification. The extent to which certain procedures are available is something officers would normally seek legal advice on.

Preparing Procurement Documents

Both the Public Contract Regulations 2015 and the Concession Contract Regulations 2016 now require that the Council has its procurement documents ready as soon as the tender opportunity is published – this includes the specification and contract documentation.

Officers will prepare the following documents based on their knowledge of the contract subject area and the Council’s requirements:

- ‘Pre-qualification questionnaire’ (“PQQ”) – this allows the Council to verify the bidders’ compliance history in relation to previous claims, financial issues, health and safety and other areas of importance to the Council. This includes pass/fail

questions as well as questions requiring a minimum score to progress to the tender stage. The government has produced a standard PQQ that must be used for all procurements, subject to a small number of permitted variations.

- Invitation to tender – this sets out as a minimum what the bidder must submit for their tender, the conditions they must comply with and the award criteria the Council will use to evaluate their tender.
- Specification – this sets out the detail of the Council's requirements for the particular goods, works or services and what it expects the provider to deliver. The detail of this will vary depending on the nature of the contract and the extent to which the Council is seeking to negotiate.

Depending on the nature of the project and the Council's specific requirements for a particular project, the Executive report may recommend that a working group of Members be set up to review key documents such as the specification. This is an opportunity for Members to input into the Council's requirements, in consultation with the officers leading on the procurement.

The preparation of the procurement documents is one of the most important aspects of the process because it will inform who the chosen bidder will be. It is therefore important that the specification fully reflects what the Council requires and the award criteria will enable the Council to choose the best provider based on its needs.

Officers will instruct Legal Services to draft the contract documentation to accompany the other procurement documents.

Clarifications and Submission of Bids

Once the documents are ready, the Council will publish the tender opportunity by way of an 'OJEU notice' and provide the documents to bidders who register their interest.

Bidders are given a certain timeframe to provide answers to the PQQ and prepare their bids. Sometimes the PQQ and tender stages are run separately (i.e. bidders have to pass the PQQ before they are invited to submit a tender) or else they are run concurrently (i.e. the bidder submits both the PQQ and tender at the same time but their tender is only scored if they pass the PQQ first). This is usually dependent on the procedure the Council is following.

Whilst bidders are preparing their answers to the PQQ and their tenders, there is a clarification process ongoing. This enables bidders to ask questions of the Council in relation to matters that they do not understand from the documents that have been provided. This may be clarification of a particular requirement, correction of typing errors that are potentially misleading and/or matters that the bidder considers may be unachievable. This gives the Council the opportunity to revisit issues that are important to bidders and consider whether it needs to change its documents to encourage viable bids.

It is also open to the Council to voluntarily clarify matters that have changed or explain new issues that have come to light since the documents were originally published (i.e. the Council does not have to wait for a bidder to ask a question if it has new information to provide).

The clarification process only runs for a specific period of time so that bidders have enough time to take account of any new or changed information before submitting their PQQ and/or bid.

Evaluation Process

The evaluation process can only be carried out by a designated evaluation panel. Officers leading on the procurement will assemble an appropriate evaluation panel based on who has the relevant expertise to evaluate specific questions.

It is common for evaluation panels to include officers with the following expertise:

- Knowledge of the subject matter to which the project relates – for service specific questions;
- Finance – for questions in relation to the financial status of the bidders and the financial viability of their bids;
- Health and safety – for questions in relation to bidders' approach to health and safety matters;
- Environmental Management – for questions in relation to bidders' compliance with environmental legislation;
- HR – for questions in relation to bidders' approach to equalities legislation, staff transfer (if there is one) and pensions (if staff are transferring);
- IT – for questions in relation to the adequacy of IT solutions used in delivering the contract;
- Insurance – for questions assessing the adequacy of the insurance that bidders have in place.

Evaluators will only be expected to mark questions within their expertise and it is important that those without knowledge of a particular area are not acting as evaluators for such questions (for example an IT officer wouldn't be asked to evaluate the health and safety questions). Some questions may be marked by more than one evaluator if a number of officers share the same expertise (e.g. it may be appropriate to have a number of evaluators for service specific questions).

Evaluation of questions must take place independently and therefore evaluators cannot confer with one another. The Procurement Manager and Legal Services can advise individual evaluators if they have specific queries on the process, etc. but nobody else should discuss or seek to influence the evaluation being carried out by panel members. Ultimately if the Council were to be challenged, by way of legal action, that individual officer would need to be able to explain to a court why they gave a particular score based on their own judgment and expertise. The officer would be in a difficult position if they had been influenced by any other person.

When preparing procurement documents, it is usually expected that the evaluation panel input in to what the questions are, so that they can advise what they would want a bidder to be able to demonstrate. This makes it easier when they come to do their evaluation.

Evaluators can only mark bids based on the award criteria the Council has specified in its procurement documents and they cannot deviate from this. The procurement documents will also set out how individual scores will be weighted including an overall weighting between price and quality (e.g. the Council may attribute 40% of the total score to the bidders' price and 60% to quality). This allows the Council to balance between getting a good price and the right quality for the particular contract.

Negotiation/Dialogue (if applicable)

In the event that the Council has provided for a negotiation or dialogue stage, the officers leading on the procurement will make a decision based on the evaluation scores and

comments from individual evaluators as to whether they wish to negotiate on any matters. The Council usually reserves the right to award without negotiation if they get a suitable bid and therefore it is not under an automatic obligation to negotiate.

If officers reach the conclusion that a negotiation stage would be helpful they will compile a list of matters on which the Council would be prepared to negotiate, consulting with the relevant portfolio holder, as appropriate. Officers will also determine the strategy for negotiation for that particular procurement, which is likely to be commercially sensitive because of the potential to compromise the Council's bargaining position.

Any information provided by bidders and/or the Council at the negotiation stage is not binding on either party at that point and therefore the Council cannot rely on indications of what a particular bid may look like – it has to wait until the final bids are submitted.

Final Tenders and Award

After the negotiation stage, the Council may refine its requirements and ask bidders to submit their final tenders. (Where there is no negotiation stage, there is only the initial tender and that is therefore their final tender).

Final tenders will be evaluated in accordance with the process set out above and the formulae within the procurement documents will enable all bidders' scores for their final tender to be combined into one overall score. The bidder with the best overall score will be awarded the contract.

The Council has to inform the winning bidder and all unsuccessful bidders of the outcome, following which the Council has to allow a 10-day 'standstill' period before formally awarding the contract. This period allows any unsuccessful bidder to challenge the procurement prior to the contract being entered into. If no successful challenge is made then the Council can proceed to enter into the contract with the winning bidder and is free to publicise the contract award. During the standstill period the Council must be cautious about making such public announcements and ensure that those that are informed keep the information confidential.

Once the contract has been entered into then the preferred bidder will be bound by what they have submitted in their tender and this will usually form part of the contract, which can be freely shared within the Council as appropriate. Some of the evidential documents provided during the procurement process will be commercially sensitive (such as the preferred bidder's accounts). That information was provided for a specific purpose (i.e. for the relevant evaluators to score) and therefore cannot be shared more widely for any other purpose without having first sought legal advice.

Warwickshire Legal Services