

REPORT TO: POLICY & RESOURCES COMMITTEE – 24 SEPTEMBER 2018

REPORT ON: UPDATE TO TENDER PROCEDURES WITHIN THE STANDING ORDERS OF THE COUNCIL

REPORT BY: EXECUTIVE DIRECTOR OF CORPORATE SERVICES

REPORT NO: 311-2018

1.0 PURPOSE OF REPORT

This report provides an update to Tender Procedures within the Standing Orders of the Council in line with Procurement Legislation. The report also details the appropriate procurement methods available for use, along with the introduction of full e-tendering which became a mandatory requirement of the most recent Procurement Legislation

2.0 RECOMMENDATION

It is recommended that the Committee:-

- Approve the changes to Tender Procedures within the Standing Orders of the Council and remit to the Head of Democratic and Legal Services to make appropriate amendments to Standing Orders.
- Approve the use of all appropriate procurement methods by the Council
- Approve the use of full e-tendering by the Council

3.0 FINANCIAL IMPLICATIONS

There are no financial implications arising as a result of this report

4.0 MAIN TEXT

4.1 BACKGROUND

Scottish Government continues to promote a national strategy of procurement reform to drive continuous improvement in procurement practice across the public sector in Scotland. This national legislative framework for sustainable public procurement supports Scotland's economic growth through improved procurement practice. Changes to the rules on public procurement in Scotland resulted from:

- Procurement Reform (Scotland) Act 2014
- EU Procurement Directive on public procurement
- EU Procurement Directive on the award of concession contracts
- EU Procurement Directive on the award of contracts by entities operating in the water, energy, transport and postal services sectors
- EU Procurement Directive for electronic invoicing in public procurement
- The Public Contracts (Scotland) Regulations 2015
- The Procurement (Scotland) Regulations 2016

4.2 PROCUREMENT PROCEDURES

Where the estimated value of any contract is likely to equal or exceed the statutory thresholds for a legally regulated procurement (whether the Scottish or European statutory thresholds) the Executive Director of Corporate Services, will ensure that the various requirements of the applicable Scottish Regulations, the EU Procurement Rules and Treaty Principles are followed.

Where it is established that any contract constitutes or is likely to constitute a legally regulated procurement, the Executive Director of Corporate Services will be responsible for determining the appropriate procedure to be followed in terms of the applicable Rules and Regulations and shall ensure that the contract is advertised, tendered, evaluated and awarded in compliance with those Rules and Regulations.

Any contract that is not required to follow a regulated procurement procedure must still be let in accordance with one of the procedures set out below and must comply with any guidance issued by the Executive Director of Corporate Services.

The main Procurement Procedures legally available, and information about the circumstances for their likely use are as follows. Very occasionally, the Executive Director of Corporate Services may authorise procurements under the processes set out in the Public Contracts (Scotland) Regulations 2015 under Regulation 37 (Electronic Catalogues), Regulation 39 (Occasional Joint Procurement), and Regulation 40 (Procurement involving contracting authorities from different member States).

In addition the Executive Director of Corporate Services may where appropriate authorise purchasing under and in terms of Regulation 38 (from Central Purchasing Bodies).

The Main Procurement Procedures

Restricted Procedure

The Restricted Procedure should be used for procurements where market analysis has shown a large number of bidders are likely to be interested in participating. In this case it is beneficial to use this procedure where the number of bidders can be reduced at the selection stage based on their capacity, capability and experience to perform the contract.

Open Procedure

In the Open Procedure any interested bidder may submit a tender.

Negotiated Procedure without Prior Publication of a Notice

Negotiated Procedure without Prior Publication can only be used in very exceptional circumstances. These exceptions are limited to cases where publishing a call for competition (e.g. Contract Notice) is not possible such as:

Where no tenders, no suitable tenders, no requests to participate or no suitable requests to participate have been submitted for a previous Open or Restricted tender exercise, provided that the initial conditions of the contract are not substantially altered. A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the organisation's needs and requirements as specified in the procurement documents. A request to participate shall be considered not to be suitable where the bidder has been or would be excluded or where it does not meet the selection criteria.

Where the supplies or services can be supplied only by a particular supplier for any of the following reasons:-

- The aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;

- Competition is absent for technical reasons (only if it is not caused by artificial narrowing down of the parameters of the procurement and no reasonable alternative or substitute exists);
- The protection of exclusive rights, including intellectual property rights (only if it is not caused by artificial narrowing down of the parameters of the procurement and no reasonable alternative or substitute exists).

Where it is strictly necessary for reasons of extreme urgency (where the time limits for the Open or Restricted Procedure or Competitive Procedure with Negotiation cannot be complied with) brought about by events unforeseeable and not attributable to the Organisation, such as emergency situations affecting the public e.g. flooding.

Competitive Procedure with Negotiation

For procuring services or supplies that require adaptation or design inputs, the use of the Competitive Procedure with Negotiation is likely to be of value. In cases of complex purchases, such as sophisticated products, intellectual services or major information and communication technology tools, the Council may have to start a dialogue with the bidders in order to guarantee the satisfactory outcome of the procurement process.

This procedure should not be used for 'off-the-shelf' services or supplies, where many suppliers can deliver the service or product.

The competitive procedure with negotiation may only be used on one of the following grounds:

- (a) Where the needs of the Council cannot be met without adaptation of readily available solutions;
- (b) Where the contract includes design or innovative solutions;
- (c) Where the requirement is complex in nature, in its legal and financial make-up or because of its risks;
- (d) Where the technical specifications cannot be established with sufficient precision; or
- (e) Where unacceptable or irregular tenders have been received following a restricted or open procedure.

Competitive Dialogue Procedure

Competitive Dialogue may be highly beneficial for organisations in circumstances where greater flexibility is needed, e.g. for highly complex and risky projects where bidders will have a major role in defining the solution or where Open or Restricted Procedure may not deliver the expected outcomes. Competitive Dialogue allows organisations to negotiate proposed solutions with bidders, and this may help to open up cross-border markets by encouraging bidders to discuss possible solutions.

The Organisation must allow any bidders to submit a request to participate in response to a contract notice within the time limit set.

Innovation Partnership

Innovation Partnership must only be used where there is a need for the development of an innovative product or service and the subsequent purchase of these cannot be met by solutions already available on the market. The use of this procedure must be justified.

The Innovation Partnership Procedure aims to solve the problem of organisations who, after awarding a research and development contract without competition, may have been unable to purchase the product directly from the developer without further competition.

The benefits of this procedure are:-

- Allowing the development of new types of goods and services;
- Market stimulation through the appointment of one or several partners competing to conduct separate research and development activities funded through the contract;
- Allowing the choice of the most suitable partners for development contracts;

- Allowing the purchase of the innovative supplies and/or services through the Innovation Partnership.

Innovation Partnership should not be used in a way that prevents, restricts or distorts competition. It should be noted an innovation partnership may also be established with one or several partners conducting separate research and development activities.

Electronic Auctions

The expression “electronic auction” means:- A repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

The Executive Director of Corporate Services may authorise the carrying out of an electronic auction where satisfied that it is in the interests of the Council to do so and that the electronic auction is in accordance with the EU Procurement Rules.

The Executive Director of Corporate Services may only authorise the carrying out of an electronic auction where he/she is satisfied that the likely benefit of an electronic auction will outweigh the costs of undertaking the electronic auction.

An electronic auction may only be carried out where the possibility of the use of an electronic auction has been stated in the approved Contract Strategy Document and subsequent Contract Documents issued to contractors and, where the EU Procurement Rules apply, in the contract notice published in OJEU.

For the avoidance of doubt, an electronic auction may be used where previous stages of a tendering procedure have not been undertaken using electronic means.

Before the Executive Director of Corporate Services may proceed with an electronic auction, a full initial evaluation of the tenders shall have been made in accordance with the award criteria. All tenderers who have submitted admissible tenders shall be invited simultaneously by electronic means to submit new prices and/or new values.

Throughout each phase of an electronic auction the Executive Director of Corporate Services shall instantaneously communicate to all tenderers involved at least sufficient information to enable them to ascertain their relative rankings at any moment. The Executive Director of Corporate Services may also, at any time, announce the number of participants in that electronic auction. In no case, however, may the Executive Director of Corporate Services disclose the identities of the tenderers during any phase of an electronic auction.

Prior to the commencement of any electronic auction, the Executive Director of Corporate Services shall intimate to all tenderers involved the date and time fixed for the carrying out of the electronic auction and the proposed duration of the electronic auction together with any proposals for the extension of the duration of the electronic auction.

Any electronic auction will be subject to such additional procedural requirements as the Executive Director of Corporate Services considers necessary.

Framework Agreements

A framework agreement is a general term for an agreement or arrangement between a supplier or suppliers, on one hand, and a contracting authority or contracting authorities, on the other, which sets out the terms and conditions under which “call-off contracts” can be made throughout the term of the agreement. A framework agreement does not bind any contracting authority to purchase goods, services or works - a contracting authority can decide to use the framework agreement if it represents value for money. Framework agreements are generally used for purchases where there is a repeat need but exact quantities or timings are unknown. They allow contracting authorities to make individual purchases without repeating many of the stages of a full competitive tendering process required by the Regulations. There is no need to formulate terms and conditions for call-off contracts because these are pre-agreed.

A contracting authority may conclude a framework agreement for its own use (single-user framework) or for use by a number of contracting authorities (multi-user framework). For example, Centres of Procurement Expertise in Scotland typically establish framework agreements for use by a wide range of defined Scottish contracting authorities. A contracting authority may also conclude a framework agreement with one supplier (single-supplier framework) or a number of suppliers (multi-supplier framework).

Where purchasing requirements are divided into “lots” to, for example, encourage competition, secure supply or maintain a consistent provision of service across different geographic areas, framework agreements may be concluded either with one supplier or a number of suppliers per lot.

Dynamic Purchasing Systems

A Dynamic Purchasing System (DPS) is an electronic system that can be established to purchase goods and services which are:

- Commonly used by the Council, and
- Readily available on the market

Using a DPS provides a simple, straightforward form of access to contracts for suppliers. When applied appropriately, it is a cost effective method that can limit the need for complex tender processes and benefit both supplier and tendering organisation. The approach lends itself well to self-limiting market places where new activity is to be encouraged.

Decisions on whether to use a DPS as a delivery option is one that needs careful consideration before making any formal commitment to do so. The intended benefits can be clear to list but what can be more challenging is actually quantifying these and selling the benefits to a wider audience. In simple terms, DPS arrangements are best suited or targeted in areas of spend where certain elements come together, in particular a large volume of suppliers (with no recognised single or natural marketplace or connection between those suppliers) combined with a large volume of transactions.

Whilst there is no single metric on what would constitute ‘large volumes of suppliers’ or ‘large volumes of transactions’, it is reasonable to expect that if the services required are to benefit from multiple suppliers then ‘large’ would be expected to be in excess of 20 suppliers. Below that number other options might provide more suitable alternatives, for example the option of setting up multiple supplier frameworks. Transaction volumes would certainly be in the hundreds and beyond per annum, with no option to consolidate the service provided and/or limit the resulting individual transactions. A recent example of this type of contract is the Scottish Government DPS for Digital Services which provides access to a wide range of digital technology suppliers and supports:-

1. Easy access for suppliers, encouraging strong competition and small and medium sized enterprise participation
2. Suppliers can join the DPS at any time, provided they meet the selection criteria
3. Completely electronic process
4. Streamlined procurement

The total anticipated spend is also a key factor in order to ensure that the effort involved returns the expected benefits from a DPS arrangement. Whilst there is not a defined figure in ‘what constitutes large volumes of suppliers/transactions’ equally there is no minimum spend per annum criteria. It is worth noting, however, that in the case of smaller spend the effort required to implement a DPS may not payback against the intended benefits.

Larger spend is a major consideration to focus on when considering whether or not to implement a DPS, and would certainly be advisable where the implementation is the first one within an organisation.

Design Contests

Special rules apply to the award of service contract through a design contest. A design contest, in this context, means a procedure in which a Service contract is to be awarded to the company or person submitting the winning design. In summary:-

- Design contests are procedures for obtaining plans or designs, which involve a jury. The jury is autonomous in making its decisions, and can offer prizes or payments, which may lead to the award of a services contract.
- The rules apply to contests which are expected to lead to public service contracts, the value of which, including the value of any prizes or payments for the contest, means that they would otherwise be subject to the regulations.

Where the rules of the contest require a services contract to be awarded to the successful contestant or one of the successful contestants, the negotiated procedure can be used without a call for competition, provided all the successful contestants are invited to negotiate the contract.

5.0 CONSULTATION

The Council Management Team have been consulted on and are in agreement with the terms of this report.

6.0 POLICY IMPLICATIONS

Procurement Strategy 2018 - 2020

The activities of the Corporate Procurement team are fully aligned to the delivery of the Council's current approved and proposed Procurement Strategy and objectives

This report has been screened for any policy implications in respect of Sustainability, Strategic Environmental Assessment, Anti-Poverty, Equality Impact Assessment and Risk Management. There are no major issues.

7.0 BACKGROUND PAPERS

None

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Date: 10 September 2018