

Committee: Full Council

Date: 22 November 2017

Wards: All

Subject: Revisions to the Council's Contract Standing Orders

Lead officer: Caroline Holland, Director of Corporate Services

Lead member: Mark Allison

Contact officer: Dawn Jolley, Head of Commercial Services

Recommendations:

- A. That Council adopt the proposed revisions made to the Council's Contract Standing Orders, effective from 1 December 2017 and for the Council's Constitution to be amended accordingly, as recommended by Standards and General Purpose Committee on 7 September 2017.
- Changes made are in response to the implementation of the Public Contracts Regulations 2015, the Local Government Transparency Code 2015 and to drive greater compliance overall with procurement governance and best practice.
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1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY

- 1.1. To inform members about the proposed changes to the Contract Standing Orders (CSOs), which form Part 4G of the Council's Constitution, in light of the legislative changes brought about by the Public Contracts Regulations 2015 (PCR 2015), the Local Government Transparency Code 2015 and the need to drive greater compliance overall with procurement governance and best practice.

2 DETAILS

- 2.1. Merton, as a public authority, is bound by the PCR 2015, which governs public sector procurement of works, supplies and services contracts. This legal framework encourages free and open competition and value for money, in line with internationally and nationally agreed obligations and regulations. As part of its strategy, the government aligns procurement policies with this legal framework, as well as with its wider policy objectives.
- 2.2. The implementation of the Public Contracts Regulations 2015 took effect from 26 February 2015. The revised Regulations aim to enable buyers to run procurements faster, with less red tape, and with a greater focus on getting the right supplier and best tender in accordance with sound commercial practice. The regulations also include some specific UK rules to support growth by improving suppliers' access to public contracts below the EU thresholds ("sub-threshold contracts") thereby driving greater access to public contracts for small and medium enterprises (SMEs).

- 2.3. The Council is also obliged to adhere to the requirements as set out under the Local Government Transparency Code 2015. The local government transparency code was published on 27 February 2015 and was issued to meet the government's desire to place more power into citizens' hands to increase democratic accountability. Its primary purpose is to make it easier for local people to contribute to the local decision making process and help shape public services.
- 2.4. The Council is obliged to maintain a set of Contract Standing Orders to cover the procurement of all works, supplies and services and the procedures underpinning them. Given that Contract Standing Orders form part of the Council's Constitution, any amendments to the CSOs must be approved by full Council.
- 2.5. Both the changes in the Regulations and the implementation of the local government transparency code had an immediate impact on the ways in which the London Borough of Merton undertakes its procurement activity, which created the opportunity to undertake a comprehensive review and overhaul of the Council's Standing Orders, to bring them in line with current legal requirements and best practice.
- 2.6. The main impacts which affect councils include:
- i) The requirement of all Local Authorities to publish, in the public domain, details of any contract, commissioned activity, purchase order, framework agreement and any other legally enforceable agreement with a value (to the provider) that exceeds £5,000 (excluding VAT).
 - ii) No longer being able to pre-qualify bidders for contracts with a value below £164,176. Contracts with a value below this threshold cannot have a formal pre-qualification questionnaire designed to restrict the number of bidders submitting bids. Certain "suitability" questions are however permitted to enable a level of shortlisting.
 - iii) Where a contract with a value over £25,000 has been advertised, there is now a requirement to advertise the opportunity nationally, via Crown Commercial Services' website, Contracts Finder. The aim is to provide smaller businesses (SME's) and voluntary or charitable organisations (VCSEs) with easier access to public sector contracts.
 - iv) All procurement documentation (Selection Criteria, Invitation to Tender, Specification, Contract Terms and Conditions, etc.) is to be made available and published at the same time as the contract opportunity is advertised. The rationale is that by publishing a full specification and terms and conditions at the outset, bidders will be better placed to gauge whether or not the opportunity is appropriate, thereby reducing unnecessary costs in bidding, for both the supplier and the Council.
 - v) A new category with a threshold of £589,148 (€750,000) has been introduced for Social and other Specific Services (otherwise referred to as the Light Touch Regime). This replaces the previous Part B services, and introduces greater flexibility with regards to the procurement of those particular services covered under this part of the PCR2015. The threshold for Supply, Services and Design Contracts as well as the threshold for Works Contracts was also updated to £164,176 and £4,104,394 respectively for non-Central

Government authorities. EU Procurement Thresholds are subject to change every two years.

- vi) The Regulations now specifically enable the Council to devote greater attention to pre-procurement activity (referred to in the PCR 2015 as preliminary market consultations) with a view to achieving better outcomes from its procurements. This is on the premise that such activity does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.
- vii) There are now six procurement procedures from which to choose. Whilst some are relatively straight forward to follow, others such as the negotiated procedure without prior publication, may only be used under very specific circumstances and as such professional advice must be sought from the Council's Commercial Services and Legal Services teams prior to them being considered as the most appropriate route to market for the Council.
- viii) The Regulations retain the right of contracting authorities to reserve participation in certain procurement exercises to social enterprises or staff mutuals (limited to a set of particular services and provided the organisations invited to bid fulfil the criteria set out in the PCR 2015);
- ix) The circumstances in which the Council shall be permitted to vary its contracts without triggering a new procurement process have been more clearly defined. For example, in future the Council will be permitted to vary a contract where the need for a modification has arisen due to circumstances which a diligent authority would not have envisaged when it let the contract and provided that the modification does not alter the nature of the contract and any increase in cost does not exceed 50% of the original contract value.

3.0 RECOMMENDED CHANGES TO CSOs

3.1 The key changes proposed within the review of the CSOs are summarised below:

a) Structure

The CSO's have been revised structurally to ensure they follow a logical path from the initial Pre-Procurement stages, through the required process and finally to contract management.

b) Application of the CSOs

The CSOs have been amended to reflect the PCR 2015, in particular to reflect those points set out at the Details section above.

c) Contracts Register

In line with the Local Government Transparency Code 2015, which sets out the minimum data that local authorities should be publishing, the frequency it should be published and how it should be published, the CSOs make it a requirement to enter

all contracts of £5,000 or greater in value¹ on to the Central Contracts Register (i.e. including concession contracts).

d) Revising the current procurement thresholds

CURRENT POSITION		
Threshold	Process	Decision Making
< £10,000	Best Value 3 written quotations, however 1 may be acceptable as an exception providing it demonstrates value for money	Responsible Officer duly authorised under a Scheme of Management
£10,000 - £100,000	Quotations 3 written quotations	Head of Service duly authorised under a Scheme of Management
£100,000 - relevant EU Threshold	Tenders Officers to decide whether a one or two (with pre-qualification) stage process is used	<ul style="list-style-type: none"> Director duly authorised under a Scheme of Management where the value of contract is between £100,000 and £500,000 OR <ul style="list-style-type: none"> Director duly authorised under a Scheme of Management and Chief Executive where the value of contract is between £500,000 and £2,000,000
> Relevant EU Threshold	Tenders , following one of the following procedures; <ul style="list-style-type: none"> Open Procedure Restricted Procedure Competitive Dialogue Procedure Call-Off from an Existing Framework Agreement 	<ul style="list-style-type: none"> Director duly authorised under a Scheme of Management and Chief Executive where the value of contract is between £500,000 and £2,000,000 OR <ul style="list-style-type: none"> Cabinet where value of the contract is £2,000,000 or greater

PROPOSED REVISIONS <i>(Highlighted text denotes the changes)</i>		
Threshold	Process	Decision Making
Up to £5,000	Best Value 3 written quotations via the Council's e-Tendering Portal, unless the responsible officer is satisfied that a single quotation can be justified. Such reasoning to be kept in writing.	Responsible Officer duly authorised under a Scheme of Management
£5,001 - £25,000	Best Value 3 written quotations via the Council's	Responsible Officer duly authorised under a Scheme of Management

¹ This is the total value of the contract and not necessarily the amount that Merton pays to the provider

PROPOSED REVISIONS (Highlighted text denotes the changes)		
Threshold	Process	Decision Making
	e-Tendering Portal, unless the requirement is urgent or it can be demonstrated there is only one supplier capable of meeting the requirement	
£25,000 - £100,000	Quotations 3 written quotations via the Council's e-Tendering Portal, although officers may choose to advertise If advertised, must also advertise on Contracts Finder also No pre-qualification stage permitted	Responsible Officer duly authorised under a Scheme of Management
£100,000 - relevant EU Threshold	Advertised Must advertise on Contracts Finder in all cases via the Council's e-Tendering Portal. No separate pre-qualification stage can be used	Responsible Officer duly authorised under a Scheme of Management OR <ul style="list-style-type: none"> Director duly authorised under a Scheme of Management and Chief Executive where the value of contract is between £500,000 and £2,000,000
> Relevant EU Threshold	Advertised using one of the following procedures; <ul style="list-style-type: none"> Open Procedure Restricted Procedure Competition with Negotiation Competitive Dialogue Procedure Innovation Partnership Call-Off from an Existing Framework Agreement Must advertise on Contracts Finder in all cases, via the Council's e-Tendering Portal	Responsible Officer duly authorised under a Scheme of Management OR <ul style="list-style-type: none"> Cabinet where value of the contract is £2,000,000 or greater

e) Advertising requirements

Due to the new requirements in the Regulations regarding the advertising of contract opportunities and awards, clarification has been added within the CSO's to ensure that the circumstances for advertising opportunities is clear.

	Contract opportunity	Contract Award
< £25,000	No requirement to advertise*	No requirement to advertise*
£25,000 - £100,0000	No requirement to advertise*	No requirement to advertise*
£100,000 - relevant EU Threshold	Contracts Finder	Contracts Finder
> Relevant EU Threshold	Contracts Finder & OJEU notice or (in the case of restricted or competitive procedure with negotiation) a PIN	Contracts Finder & OJEU

** While there is no requirement to advertise the opportunity, Officers may due to the requirement of market conditions choose to do so. Where the opportunity is publically advertised, an advert and award notice must be placed on Contracts Finder where the contract opportunity is above £25,000*

All opportunities will need to be placed through the Council's e-tendering system, which has a direct feed to Contracts Finder and the OJEU, ensuring Officers can use one system to place all of the required advertisements where applicable.

f) Framework Agreements

Further clarification has been added regarding the process for dealing with Framework Agreements. Specifically, where the Council plans to procure a new Framework Agreement, then the procurement would be subject to the same requirements as any other contract based on its value. No further approvals will be required beyond setting up the Framework i.e. sign off will not be required to enter in to a call off contract from a Council Framework agreement.

Where the Council intends to enter into a Call-off Contract from an externally procured Framework Agreement, such as those operated by a Professional Buying Organisation (e.g. Crown Commercial Services and ESPO) or another public sector organisation, the Officer will require approval from the Director of Corporate Service (or their nominee) to use the Framework as well as the appropriate approval based on the value of the call off. Prior to seeking approval from the Director of Corporate Services (or their nominee), written confirmation must also be sought from both Commercial Services and Legal Services that it is lawful for the Council to access the said agreement.

g) Reinforcing the use of the e-tendering system and record keeping

We have taken the opportunity to reinforce the use of e-tendering across the Council for all contracts over £5,000, in order to satisfy the requirements of the legislation to “provide electronic access [to the procurement documents] from the date of the OJEU notice.

Furthermore, the electronic audit trail created by utilising the system will ensure Officers are able to easily create a conclusion report, with the supporting evidence readily available, as required by the new Regulation 84.

h) Concessions Regulations 2015

New regulations covering the procurement of Concessions contracts came into force in April 2016. This has provided the opportunity to reflect on the impact of the new requirements and strengthen our procurement governance when considering those projects with the potential to generate income for the Council.

i) Recording of Declarations / Conflicts of Interest

The current paper version of the form (attached for reference) is in the process of being updated and in future Declarations of Interest will be recorded electronically.

4. PROCUREMENT TOOLKIT REFRESH

4.1 Along with the proposed revisions to the CSOs the Procurement Toolkit, available to staff via the Council’s intranet, will be refreshed in order to further support Officers undertaking compliant, outcomes focused procurements that meet the Council’s needs now and in the future. This will be a ‘live’ document which will be updated as and when.

4.2 Key updates to include:

- i) The creation of a suite of template documents for all the main procedures, including Quotations, Open and Restricted OJEU tenders and supporting detailed guidance notes.
- ii) Short summary guides and tables which offer a ‘quick guide’ to the approvals, advertising and procurement procedures based on the contract value
- iii) Detailed guidance on Market Engagement, drafting Prior Information Notices (PINs) and the requirements of the Light Touch Regime.
- iv) ‘Process flows’ for each procurement process, showing Officers the key stages and minimum timescales required to undertake the individual process, such as Open, Restricted and Competitive with Negotiation.
- v) Templates for obtaining approval to invite tender and award a contract, where Officers have delegated authority as part of the Scheme of Delegation.
- vi) A Commercial and Procurement glossary.

4.3 All documents have been created using the same themes and language to ensure consistency and so that the principles are clear and easy to understand.

5 ALTERNATIVE OPTIONS

- 5.1 Leave the CSOs as they are, previously revised by Full Council on 19 November 2014. This option is not recommend given that CSOs are required to be amended to ensure they are complaint with current legislation and best practice.

6 CONSULTATION UNDERTAKEN OR PROPOSED

- 6.1. The Council's Procurement Board as well as the Departmental Operational Procurement Groups have been given the opportunity to comment on the proposed amendments to CSOs

7 TIMETABLE

- 7.1. It is anticipated that should the proposed amendments be approved by Full Council in November 2017 that the updated CSOs will be effective 1 December 2017.

8 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 8.1. None.

9 LEGAL AND STATUTORY IMPLICATIONS

- 9.1 The Local Government Act 1972 (Section 135) requires that Local Authorities make Standing Orders in respect of contracts for the supply of goods, services and materials or the execution of works to ensure competition and regulate the manner in which tenders are invited.

10 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

- 10.1 None.

11 CRIME AND DISORDER IMPLICATIONS

- 11.1 None.

12 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 12.1. By revising and updating the Council's Contract Standing Orders, risk of Legal Challenge for failure to follow due process should be mitigated at least in part.

13 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT

- 13.1. Proposed Revised Contract Standing Orders
13.2 The current Declaration of Interest Form

14 BACKGROUND PAPERS

Public Contracts Regulations 2015;
Local Authority Transparency Code 2015;
Concession Contracts Regulations 2016.