

CHESHIRE EAST COUNCIL

Constitution Committee

Date of Meeting: 22nd September 2011
Report of: Borough Solicitor
Subject/Title: Proposed Amendments to the Council's Contract Procedure Rules

1.0 Report Summary

- 1.1 The purpose of this report is to propose amendments to the Council's Contract Procedure Rules and to seek the approval of the Committee and a recommendation from it to the Council that the amendments be made.

2.0 Recommendations

- 2.1 That the amendments to the Contract Procedure Rules (as set out in the Appendix to this report) be recommended to the Council for approval and the Constitution be amended accordingly.

3.0 Reasons for Recommendations

- 3.1 The Council's Contract Procedure Rules form part E of the Council's Constitution.
- 3.2 The amendments have been proposed to reflect best practice developed by the Procurement Unit, including clarification on the use of Delegated Decisions by Chief Officers. Amendments are also proposed to take into account new legislation and the Council's ability to receive electronic tenders, as well as to clarify and remove parts of the Contract Procedure Rules which are no longer applicable. There is also a proposal to increase the financial threshold at which the Contract Procedure Rules require a formal tendering procedure from £50,000 to £75,000 which it is anticipated will make it easier for SMEs to engage in business with the Council.

4.0 Wards Affected

- 4.1 Not applicable.

5.0 Local Ward Members

- 5.1 Not applicable.

6.0 Policy Implications

- 6.1 None identified.

7.0 Financial Implications

7.1 None identified.

8.0 Legal Implications

8.1 Any changes to the Constitution need to be agreed by the Council following a recommendation from the Constitution Committee. Any changes which are proposed also need to comply with the relevant statutory requirements.

8.2 The Purchase of goods, services and works by the Council as a public sector body is regulated by the Public Contracts Regulations 2006 (the Regulations) which implement into English law the EU procurement regime currently in place throughout the EU.

8.3 It is important to note that the Regulations only apply to contracts with a value that exceeds the relevant thresholds. The current thresholds that apply to local authorities are as follows:

SUPPLIES (GOODS)	SERVICES	WORKS
£156,442	£156,442	£3,927,260

8.4 However, in undertaking any procurement (including those below the EU threshold) a contracting authority must also comply with the following key principles (derived from the Treaty on the Functioning of the European Union (TFEU) and the fundamental freedoms of the EU):

- Proportionality
- Mutual recognition
- Transparency
- Non-discrimination
- Equal treatment

8.5 In simple terms, the Council is required to act in a transparent way, treating all potential providers equally and in a non-discriminatory way. There are also detailed requirements in relation to the drafting of technical specifications, the requirement to publish contract award notices and submission of returns to the Office of Government Commerce (OGC).

8.6 As third parties have a right to take court action for financial loss if there is any failure to comply with the principles, it is extremely important that the Council does comply with the key Principles set out in paragraph 8.4.

9.0 Risk Management

- 9.1 Increasing the threshold beyond which a formal tendering exercise is undertaken potentially exposes the Council to the risk of challenge if the principles within the Treaty of Rome are breached and it is therefore imperative that if an increase is made the Procurement Unit introduce mechanisms to ensure that officers involved in the procurement process are fully aware of the relevant requirements. These officers will be identified by way of a skills audit and delivery of appropriate training.

10.0 Background and Options

- 10.1 At the last meeting of the Committee Council was asked to defer consideration of the report to a future meeting to enable further work to be carried out and that a report be brought to a future meeting reviewing and amending the Finance element of the Finance and Contract Procedure Rules.

- 10.2 At its meeting held on 21st July 2011 the Council resolved

- 1 That Council note that the Constitution Committee has deferred consideration of the report to a future meeting to enable further work to be carried out.
- 2 That a report be brought to a future meeting of the Constitution Committee, reviewing and amending the Finance element of the Finance and Contract Procedure Rules.
- 3 That in the interim, and in no way fettering the Constitution Committee, the financial threshold at which the Rules require a formal tendering procedure be increased from £50,000 to £75,000.

- 10.3 The Borough Solicitor also met with the Vice-Chairman of the Committee to consider issues arising from the debate at the last meeting of the Committee, as a result of that meeting further amendments to the Rules were made, namely:

1. A robust statement added at the start of the Rules emphasising the obligation of officers comply.
2. Clarification on the circumstances where it is appropriate to request a Delegated Decision to waive competition.
3. An explanation of how the total value of a contract is to be calculated.
4. Additional wording on procedure that is required at relevant thresholds.
5. A statement that the Council can procure through a consortia framework if legally entitled or as a member of a consortium.
6. Guidance that it is the procuring officer's responsibility to maintain written quotes for audit purposes.
7. Clear demarcation of the process for submitting hard copy and electronic tenders.

8. A requirement that a procuring officer takes advice from the Borough Solicitor should he not wish to exclude on the basis of a tenderer being insolvent, being convicted of a criminal offense relating to running a business, grave misconduct in running a business or failure to pay taxes or social security contributions.
9. Explanation that in some circumstances a quote can be selected on the basis of the most economically advantageous quote.

10.4 Contract Procedure Rules - Amendments

Since vesting day, the Council has approved a number of amendments to the Constitution. As new legislation comes into force, and as the Council finds better ways of doing things, building upon experience and best practice, the Constitution will continue to need to be amended. The proposed amendments to the Contract Procedure Rules reflect the above. In addition, the opportunity has been taken to make it easier for SMEs to do business with the Council by raising the financial threshold, so that a formal tender process is only required for goods works and services in excess of £75,000 from the current threshold of £50,000.

10.5 Electronic Tendering

Electronic Tendering was introduced by the Procurement Unit in order to achieve a more efficient, more transparent and more accessible to the market method of procurement. This has a number of benefits for the Council and also the business community. The use of e tendering allows suppliers to be notified of an opportunity, to express an interest, to pre qualify, download tender documents and submit a response. This increases the awareness of our opportunities to the supplier community and also the likelihood of increased value for money for the Council. This promotes competition for the tender, and provides a process that is efficient for both the council and suppliers and a selection process that is transparent to bidders. It is proposed that Rule E55 is amended to incorporate this process.

10.6 Knowledge Map

It is recommended that the Contract Procedure Rules be amended to incorporate appropriate references to the Council's Knowledge Map which has been launched and provides an online interactive guide to the procurement processes. The Knowledge Map is very easy to use and provides detailed guidance on how to procure goods and services. It contains policies, procedures and standard templates for use in the procurement process. The map will not only improve efficiency and ensure consistency in the procurement process but will also reduce the risk of non-compliance.

10.7 Increase to Thresholds

10.7.1 It is recommended that the threshold be increased from the current threshold of £50,000 so that a formal tender process will in future only be required for goods, works and services in excess of £75,000.

The proposed new thresholds will be:

	Total Value	Procedure to follow where no Contract exists
Informal	Below £10,000	E-mail /telephone quotation(s)
	Above £10,000 but below £75,000 for goods, services and works.	Comparison of written quotations from at least 3 bidders.
Formal	Above £75,000 but below the EU threshold* for goods, services and works.	Formal tender process from at least 3 suppliers.
	Above the EU threshold* for goods, services and works.	Tender process in accordance with EU Procurement Rules.

10.7.2 The difference between the formal tendering process for contracts above £75,000 but below the EU threshold and a full tender process in accordance with EU Rules is that the EU Rules have mandatory procedures and mechanisms which the Council must comply with. This includes, for example, the time scales for issuing the advert and minimum response times which are laid down and prescribed. The Council's formal tendering procedure is not as strict or prescriptive, particularly in relation to the various timescales required.

10.7.3 The current Rules provide that procurements for spend exceeding £50,000 should follow a formal tender procedure. This enables the Council to control and monitor the manner in which below EU threshold procurements are conducted and to ensure that the principles of proportionality, transparency and equal treatment are not breached.

10.7.4 There is a concern, however, that the formal tendering route may disadvantage SMEs and there is growing support for awarding contracts to smaller local organisations with a view to stimulating and supporting the Local Economy and the Procurement Unit is working to encourage SMEs to become involved in tenders, by various means, including providing training on the procurement procedure. Unfortunately there are tensions with the underlying principles of European Procurement Regulations which seek to put all European operators on an equal footing in tendering and ensure that the foremost evaluation criteria is MEAT (Most Economically Advantageous Tender) with no discrimination on the grounds of nationality. In effect a balance needs to be found between

making the Council's opportunities more accessible to SMEs without in fact giving SME's an unfair advantage.

- 10.7.5 Accordingly, if the threshold for the formal tender process is increased to £75,000 as recommended, the Council must ensure that the selection of contractors is transparent, non-discriminatory and treats all parties equally in order to avoid the risk of challenges to its appointment of contractors.

10.8 Informal Tenders below £10,000

- 10.8.1 Quick quote provides the ability to run a simplified quotation procedure for one off purchases with a low value (under £10,000). This function is especially useful for procedures with a quick turnaround time. The system suggests three local suppliers where available for the specific category and allows them to be notified of the opportunity along with other potential suppliers thus increasing the opportunities for local SME success in contracting with the Council.

- 10.8.2 For contracts under £10,000 there is currently no requirement for a written contract signed on behalf of the Borough Solicitor. The possibility of increasing the threshold for which a contract signed by the Borough Solicitor is required has been considered but from a legal perspective certainty in relation to the terms on which the Council is purchasing is essential. The Council is bound by law to include certain provisions when it contracts, for example ensuring that a contractor's sub contractors are paid within certain time scales. Other terms are needed to identify each party's responsibilities so that in the event of disagreement the recourse of the parties is clear. As a result an increase in the current threshold of £10,000 is not recommended.

10.9 Bribery Act 2010

The Bribery Act 2010 came into force on the 1st July 2011 and introduced a new offence of a commercial organisation failing to prevent bribery. The Council already has anti corruption provisions in its tendering documentation and contracts. The government has confirmed that a conviction for the offence will trigger discretionary not mandatory exclusion from competing for public contracts under regulation 23 of the Public Contracts Regulation 2006 (SI 2006/05). It is proposed that our procurement documentation is amended to include reference to the new offence and that our contracts contain a right to terminate a contract in the event that a contractor has such a conviction.

Access to Information

The background papers relating to this report can be inspected by contacting the report writers. There are no specific background documents.

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