

**Open Report on behalf of James Drury, Executive Director - Commercial**

Report to:	<b>County Council</b>
Date:	<b>17 May 2019</b>
Subject:	<b>Changes to the Council's Contract Regulations</b>

**Summary:**

The report proposes changes to the Contract Regulations in the Council's Constitution, firstly to increase the threshold above which the Council must seek competitive quotes and secondly to amend the thresholds governing who can take decisions to approve exceptions to the Contract Regulations

**Recommendation(s):**

That the Council approves the amendments to the Contract Regulations forming part of the Constitution, as set out in the tracked changes at Appendix A to the Report.

## **1. Background**

- 1.1 The Contract Regulations are part of the Council's internal governance mechanisms. Their objective is to balance efficient and effective administration with the need to ensure value for money.
- 1.2 Above certain financial thresholds the Council has an obligation to comply with EU procurement rules embodied in domestic law in the Public Contracts Regulations 2015. These EU thresholds are set out below:
  - £181,302 the Services threshold for Non-Health and Social Care Services Contracts.
  - £615,278 the Services threshold for Health and Social Care Services Contracts.
  - £4,551,413 the Works threshold for Works Contracts.
- 1.3 Above these threshold a competitive procurement is required subject to very limited and tightly defined exceptions. Below these EU thresholds, the Council can generally lawfully let a contract without prior advertisement or competition. The Council's own Contract Regulations, however, set out the contract award processes that the Council has itself adopted in cases below the EU threshold. Because these are the Council's own procedures the

Contract Regulations also provide for those procedures to be set aside and prescribe who the decision-maker is for any decision to do so.

- 1.4 This Report proposes changes to (i) increase the threshold above which the Council must seek competitive quotes and (ii) to amend the thresholds governing who can take decisions to approve exceptions to the Contract Regulations.

#### *Seeking Competitive Quotes*

- 1.5 Since 2016 the Council's Contract Regulations have required officers to request three written quotations based on a Request for Quotation ("RFQ") document with appropriate contract terms and conditions for all contracts over £5,000. Prior to 2016 direct approaches were permitted to a single supplier for anything below £10,000.
- 1.6 Direct approaches to a single supplier are popular with the market. This is particularly the case for small and medium sized enterprises as the reduction in official procedures makes the Council's business more available to them. Small and medium size enterprises (SMEs) form a significant proportion of the Lincolnshire economy and therefore the establishment and growth of SMEs is an important consideration for the Council. One way in which such growth can be encouraged is to enable SMEs more easily to carry out work for the Council.
- 1.7 Although generally competition can lead to increased value for money and potential savings for the Council the level of savings on contracts below £10,000 is not significant and may well be outweighed by the officer time spent in putting together RFQ documents and seeking and evaluating quotes. It is felt that the time saved could be better utilised on higher value activity such as improved contract and supplier management or in consideration of how innovation might streamline or improve services.
- 1.8 When the threshold was reduced in 2016 there were also concerns that this additional administrative burden on the Council and schools would mean non-compliance would simply increase or that the low value would act as an incentive to break the purchase of goods/services up to reduce the value under £5,000, and then have further purchases via a purchase order rather than going through the process of gaining a number of quotes or an exception report. Whilst it is difficult to know whether in fact this has happened there is certainly potential for it.
- 1.9 A review of the thresholds operated by other authorities from their websites shows the Lincolnshire Districts have a threshold of £5,000 with the exception of South Kesteven District Council which is £10,000. North Yorkshire County Council has a threshold of £25,000 and Derby City Council £10,000.

- 1.10 On the basis of the potential to improve the participation of SMEs in carrying out work for the Council and to release officer capacity it is proposed that the Low Value Procurement Threshold set out in paragraph 3.3 of the Contract Regulations in Appendix A, below where officers may make a direct approach to a single supplier without requesting competitive quotations is increased from £5,000 to £10,000.
- 1.11 It is further proposed that the Medium Value Procurement upper threshold above which purchases will require four rather than three written quotations based on a Request for Quotation ("RFQ ") document with appropriate contract terms and conditions is increased from £15,000 to £25,000. This is primarily to encourage SMEs to participate by increasing their chances of success.

#### *Approving Exceptions to Contract Regulations*

- 1.12 The Contract Regulations recognise that in exceptional cases an alternative route to the usual contract award process might be appropriate. Currently approval to follow an exception route is obtained from;
- a) Chief Officers where the contract has an Estimated Total Contract Value between £10,001 and £75,000.
  - b) Executive Councillors for contracts with an Estimated Total Contract Value between £75,001 and £250,000.
  - c) Executive for contracts with an Estimated Total Contract Value over £250,000.

The above thresholds have been the same for many years and have not increased in line with increases in prices or been reviewed to ensure they strike the right balance between the delivery of value for money and responsive decision-making.

- 1.13 The Council has significantly increased the volume of procurement activity over recent years. The move to the Council becoming a Commissioning Council has led to much greater emphasis on pursuing an ongoing cycle of contract review and re-procurement. For example all of the Council's adult social care and community wellbeing contracts are now regularly re-procured, generally every 3 years. Since 1 January 2015 there have been 47 high value procurements with an annual procurement value on average of c£70m. For non-adult social care procurement team in 2018/19 there were 107% more procurement projects undertaken on behalf of the County Council than in 2010/11 – 29 in total.
- 1.14 In addition to increasing volumes the adoption of a commissioning approach centred on improved outcomes has increased the complexity of procurements with commissioners working with the Commercial Team on each and every procurement to see how service can be better delivered including the bringing together into one contract of services previously procured separately.
- 1.15 Therefore there has been an increase in above-EU threshold procurement and a reduction in the direct award of contracts. However, that in itself has

a cost to the Council as the carrying out of full procurement processes takes considerable resources both for the Council and potential bidders.

- 1.16 For this reason, under the proposed new Procurement Strategy which was endorsed by Overview and Scrutiny Management Board in April and which went to Executive on the 8 May 2019, there is a commitment to reduce the number of bespoke procurements by increasing the use of Framework Agreements and exploring greater use of direct awards where appropriate and lawful. So the intention of the Council expressed through its Procurement Strategy is to recognise the benefits of direct award as part of a balanced professional and effective approach to commissioning and procurement. This in turn means there is likely to be a greater use of the exception procedure. To create efficiency it makes sense for the exception procedure to be readily and easily accessible so that procurement work is not replaced by the work involved in going through formal decision making.
- 1.17 To facilitate that and to update the thresholds it is proposed that:
- a) Chief Officer approval would be required to an exception route for contracts valued at up to £250,000 subject to the Chief Officer consulting with their Executive Councillor on all exceptions where the contract value exceeds £75,000.
  - b) Executive Councillor' approval would be required to an exception route for contracts valued between £250,000 and the Health and Social Care Services Contracts EU Threshold as varied from time to time (currently £615,278).
  - c) Executive approval would be required to an exception route for contracts valued at over the Health and Social Care Services Contracts EU Threshold as varied from time to time (currently £615,278).
- 1.18 This would speed up decision making and streamline the process, releasing resource. The officer decisions in particular (i.e. those under £250,000) would not be key decisions and therefore would not be required to be entered on the forward plan. Nor would they be subject to the need for reports to be published 5 clear working days prior to decisions being reached or to call in. Although this may lead to less scrutiny, it would enable the Council to respond more quickly.
- 1.19 This would be of particular value for Social Care Services Contracts. The special, EU threshold for these contracts already recognises that direct award is often necessary and appropriate in relation to such services and that as a result the legal threshold at which competition is required is set higher. Many such contracts can be highly specialised and localised in their requirements. Often there is not a ready market with the necessary local presence or sufficient value in the contract or contract duration to attract providers into the market. Providers can often be charitable or not-for profit organisations limited in their ability to make the kinds of commercial risk-based judgments which competition is designed to elicit. Finally there can also be a requirement for the Council to act swiftly – e.g. where central government money is made available on the understanding that it must be

spent quickly for example to alleviate winter pressures. There is therefore a potential risk that delays in procedure could result in a loss of some one-off funding.

- 1.20 These extensions are consistent with Chief Officers' general powers to undertake the day to day management and control of their Directorate/office including the power to place contracts and are commensurate with the values they expend doing so. Member oversight would be maintained by the requirement for Chief Officers to consult with their Executive Councillor on contracts worth more than £75,000. Similarly Executive Councillors already fully participate in decision making with 29 key decisions during the period June 2018-May 2019 taken by Executive Councillors compared to 33 by the Executive. Many of these key decisions already being taken by Executive Councillors will be of more significance than deciding whether or not to permit an exception to the Council's usual procurement process. It is not, therefore, felt that there are any increased financial or other risks to the Council should the changes be agreed.
- 1.21 The recommendations were taken to the Audit Committee on the 25 March 2019. The Audit Committee supported the proposals set out in paragraphs 1.10 and 1.11 above ( paragraphs 1.7 and 1.8 of the report to the Audit Committee ) relating to increasing the threshold above which the Council was required to seek competitive quotes for low and medium value procurements. However the Committee felt further justification for the proposed changes at paragraph 1.17 above (paragraph 1.10 of the report to the Audit Committee) was required to support the rationale, as outlined in the report. Consequently further information has been provided as to the need and importance of efficiency, the possible consequences of delay and the risks associated with an expansion of the scope of officer and Executive Councillor decision-making in relation to exceptions to Contract Regulations.

## **2. Legal Issues:**

### Equality Act 2010

Under section 149 of the Equality Act 2010, the Council must, in the exercise of its functions, have due regard to the need to:

- \* Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act
- \* Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- \* Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation

Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

- \* Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
- \* Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
- \* Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding

Compliance with the duties in section 149 may involve treating some persons more favourably than others

The duty cannot be delegated and must be discharged by the decision-maker. To discharge the statutory duty the decision-maker must analyse all the relevant material with the specific statutory obligations in mind. If a risk of adverse impact is identified consideration must be given to measures to avoid that impact as part of the decision making process.

Equality impacts have been considered but none arise as a result of the decision.

#### Joint Strategic Needs Analysis (JSNA and the Joint Health and Wellbeing Strategy (JHWS)

The Council must have regard to the Joint Strategic Needs Assessment (JSNA) and the Joint Health & Well Being Strategy (JHWS) in coming to a decision.

Potential impacts on the Joint Strategic Needs Assessment and the Joint Health & Well Being Strategy have been considered but none arise as a result of the decision.

#### Crime and Disorder

Under section 17 of the Crime and Disorder Act 1998, the Council must exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment), the misuse of drugs, alcohol and other substances in its area and re-offending in its area.

Potential section 17 of the Crime and Disorder Act 1998 impacts have been considered but none arise as a result of the decision.

### 3. Conclusion

The proposals are put forward because they will streamline the procurement process, speeding it up at the same time as saving resource. The proposals to increase the direct award threshold and to only require three quotes for purchases between £15,000 and £25,000 will benefit Lincolnshire's SME.

#### 4. Legal Comments:

The proposals set out in the Report are lawful.

The Contract Regulations form part of the Council's Constitution. Amendments to the Constitution must be approved by full Council.

#### 5. Resource Comments:

The proposals are expected to result in more efficient practices and thereby lead to better use of resource. Any potential loss in value for money arising from the proposed increase in the threshold for obtaining competitive quotes is expected to be outweighed by savings in officer time, and the proposed amendments to the thresholds for approving exceptions to the Council's contract regulations are not expected to introduce additional financial risks.

### 6. Consultation

#### a) Has Local Member Been Consulted?

n/a

#### b) Has Executive Councillor Been Consulted?

Yes

#### c) Scrutiny Comments

n/a

#### d) Have Risks and Impact Analysis been carried out?

Yes

#### e) Risks and Impact Analysis

Set out in the body of the report

## 7. Appendices

These are listed below and attached at the back of the report	
Appendix A	Proposed changes to the Contract Regulations

## 8. Background Papers

Document title	Where the document can be viewed
Council's Contract Regulations in Part 4 of the Constitution	Democratic Services
Report to Audit Committee 25 March 2019	Democratic Services

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