

Ward: N/A

The Letting and Management of Commercial Contracts

Report by the Director for Digital and Resources

1.0 Summary

- 1.1 This report has been produced at the request of the Joint Overview & Scrutiny Committee held 13th March 2014 who requested an item to be added to their work programme concerning “letting and management of commercial contracts”. The report explains the current procedures in place for letting contracts and summarises some of the recent improvements that have been made in the last 6 – 12 months.

2.0 Background

- 2.1 This report has been produced at the request of the Joint Overview & Scrutiny Committee held 13th March 2014 who requested an item to be added to the work programme concerning “letting and management of commercial contracts”.

3.0 The rules for the letting of Commercial Contracts

- 3.1 Procurement is the purchase of goods, services and works contracts, of any value for and on behalf of the Council.
- 3.2 In 2004 the European Commission published a Directive imposing procurement obligations on public services. The Directive was implemented into UK law by the Public Contract Regulations 2006 which apply to all procurements over the European financial thresholds; £172,514 for goods and services and £4.2 million for works contracts.
- 3.3 For contracts below these thresholds the Councils are bound by the principals of transparency; equal treatment, anti-discrimination; mutual recognition, proportionality and obtaining value for money and these principals apply to all procurement exercises.
- 3.4 In 2014, the new Directive was published by the Commission. This must be implemented into UK law, by UK legislation, prior to April 2016. The new legislation will codify established case law, promote the European Strategy for sustainable and inclusive growth while ensuring efficient use of public funds, and include significant changes to promote small to medium sized enterprises.
- 3.5 In addition to the legislation, the Councils have adopted their own Contract Standing Orders (CSO's) as approved by Members. The CSO's lay down rules and

procedures to ensure there is a consistent and uniform approach to procurement for the protection of the Council.

- 3.6 They are joint rules and should be followed by *all* Officers, Councillors, and Consultants employed by the Councils, whether or not they are acting for Adur or Worthing.
- 3.7 This report will focus on the following criteria, all of which are to be present for the successful letting and management of commercial contracts and will finish with a discussion on the perceived weaknesses and improvements that have recently been made:
- Pre-contract and procurement considerations
 - The procurement process and Contract Standing Orders (CSO's)
 - Procedures for varying or extending the contract
 - The preparation and execution of commercial contracts
 - Monitoring the project – active project management
 - Planning for the end of the contract
 - The perceived weaknesses
 - What has been done to improve matters; what results have been achieved

4.0 Pre-contract and procurement considerations

- 4.1 The total contract value must be ascertained in advance of any procurement process. This will be the aggregate figure of; the payments to the supplier over the life time of the contract; maintenance, disposal and replacement costs of any equipment, the value of any potential extension and the value of any finance leasing arrangement.
- 4.2 The authority to enter into the contract must be obtained in advance of carrying out a procurement exercise. There may be a delegated authority under the Scheme of Delegations and this should be checked by each individual Officer prior to commencement. At present the Scheme of Delegations is being updated as part of The Constitution. If there is no delegated authority, then authority must be obtained by writing a report and presenting it to the appropriate Committee or Cabinet Member. Without the authority to enter into the contract, it will not be signed by the Legal Team or approved by the Procurement Department.
- 4.3 The Social Value Act 2012 introduced the requirement for mandatory consideration of the additional economic, social and environmental impact the contract can bring to our area and for procurements / tenders to be written in such a way that this additional criteria can be evaluated and scored.
- 4.4 Timing is all important; the correct tender process takes time if it is to be carried out using best practice. The CSO's require advanced notification of procurement to both the Procurement and Legal Departments. Proportionate pre-contract meetings are required well in advance of the start date, to ensure that each Officer knows their place in the procurement and what needs to be done to achieve a good result and ensure there are no last minute delays. As an example, a contract in excess of the European Commission procurement thresholds mentioned in paragraph 3.2 above can often take 9 months from the start of the process to the contract award.

- 4.5 A specification should be written by the Officer running the tender who should know exactly what he or she wants to achieve. The Officer does not necessarily need to know how to achieve it, as tenders for designs and ideas may be invited, but a detailed specification for the Councils' expectations should be written and sent with any request for quotations or tender / procurement documents.

5.0 The procurement process and Contract Standing Orders

- 5.1 The procurement process and the CSO's have been summarised in the Matrix attached to this Report as **appendix 1**. It has recently been re-designed by the Procurement and Legal teams. It updates and replaces a previously used, out of date, flow chart.
- 5.2 The type of procurement process to be followed depends upon the value of the contract having regard to all of the items described at 4.1 above. When the value is known the Officer needs to follow along the line of that value and will know what to do and who to contact. Boxes marked with a green question are discretionary and boxes marked with a red tick are mandatory. The Officers are actively encouraged to always ask the Legal or Procurement teams if in doubt, and go to the relevant section of the CSO's.

6.0 Particular procedures for extending and varying a Contract

- 6.1 There are precise procedures in the CSO's for varying or extending a contract. For a contract extension, all of the following criteria must apply:

CSO 8.25.1 & 8.25.2

- √ the extension must be authorised and budget obtained
- √ the value of the contract must be less than 100k
- √ the extension is for goods, works or services substantially similar
- √ the contractor must re-tender or re-quote for the extension, if the value exceeds £2.5k or 10% of the original successful tender
- √ the original contract was performed not < 12 months prior to extension
- √ where construction works – must be same site as original
- √ where original tender > £25 k, at least 3 tenders were received in the first place
- √ no previous extension – and not longer than 18 months
- √ extension is approved by the Executive Head of Corporate & Cultural Services

By CSO 8.25.2 in all other cases, approval should be obtained from the Joint Strategic Committee before any extensions are granted.

- 6.3 Contract variations are referred to at CSO 8.26. For a contract variation to be within the rules, the variation must be within the scope of the original contract; the variation must not exceed 20% of the original contract value (and upon this advice is to be taken from the Procurement Department) and is to be approved by Head of / Director for the Service. Variations that significantly affect the scope or value were to be referred to the Executive Head of Corporate and Cultural Services and now to the Director for Digital & Resources.

7.0 The preparation and execution of Contracts

7.1 Under the CSO's where a contract, variation or extension, is for a value of £25,000 or more, it is to be in a written form approved of and executed by the Legal Department.

7.2 The Solicitors dealing with commercial contracts of all types are commercial lawyers, experienced in negotiating in a robust way where necessary, and have the benefit of excellent legal research web sites, as well as commercial contracts updates and ongoing professional training.

7.3 Usually, the Councils draft their own contracts, alternatively the contract may be a standard industry approved contract, such as the JCT (Joint Contracts Tribunal) suite of contracts for construction work.

7.4 In the year preceding this Report, the Council has executed over 115 contracts of all varieties which include but are not limited to:

- Construction contracts, including play areas, water fountains, extensions to properties and general building work
- Installation of cinema equipment
- Installation of Gym equipment at Splashpoint and Davidson Leisure
- Pier maintenance works
- Leases and licences for all Council properties
- A Box Office ticketing system
- Sale of Aquarena swimming pool
- Cancer Health Champions – detection of early cancer signs
- Wellbeing contracts, motivating the elderly, preventing social isolation
- Section 106 Agreements
- Renewal of the legal research resource Lexis Nexis
- E-commerce payment facilities
- Software licences and IT contracts
- Professional services for New Ways of Working office moves and connected contracts
- Vehicle contract hire schedules, pool cars and general car hire
- Repair and redecoration for Council properties
- Refurbishment and extensions to Shoreham Community Centre
- Gas connections to Adur properties
- Licence to remove protected reptile species
- On Street car parking contracts
- Artists chalet contracts Beach Green
- Supply and planting of trees at Beach House Grounds
- Sale of freehold land with vacant possession at 2 Bedford Row
- Virgin Media Ltd to install telecommunications apparatus at Connaught Theatre
- Engineering and construction for the new soccer centre
- Supply of bedding plants
- Supply of hanging baskets

7.5 Where it is suggested that in rare circumstances the Council contracts use the supplier's standard terms (which may be because the suppliers' standard terms are

so specialist that they warrant being used, or the minimal value and simplicity of the contract makes it disproportionate to draft a new contract), the contract should always be checked by Legal, whatever the value. This is also the case for contracts that involve any complex issues, a variation, or an extension, or a financial leasing document which is also checked by the Finance Department.

- 7.6 In addition to the above, Members recently amended the CSO's to lower the threshold to ensure that no Officer may enter into a contract between the value of £5,000 and £10,000 unless this has first been shown to the Procurement team that best value has been obtained. Contracts above this level have best value checks written into the CSO's.
- 7.7 The Officer in charge of the contract should instruct Legal by completing the attached Legal Instruction Form marked as **appendix 2**.
- 7.8 Upon receipt of the Legal Instruction Form, the lawyer will arrange a meeting with the Officer to go through the requirements and understand the nature of the contract. When the contract is drafted, the lawyer will discuss the contents and general nature of it with the Officer in charge and advise on any project management clauses that need to be adhered to so that the Officer understands what the Councils' obligations will be.
- 7.9 For executing contracts, the practice is always, that the lawyer who drafted the contract is not the lawyer to sign it. There are procedures in place to ensure that the contract and its authority to enter into it is checked by a second lawyer who has been asked to sign the contract. Prior to signing, the contract is written into a signature book, with the date, the parties, and the authority to enter into the contract. The contract and the signature book are presented to the signatory. Pertinent questions are raised orally by the lawyer signing the contract to ensure it is in order.
- 7.10 Different lawyers have their own delegated authority to sign documents depending upon the document types and the lawyer's level of experience. The Councils' Monitoring Officer maintains a central record of Officer Delegations.

8.0 Monitoring the ongoing project – active contract management

- 8.1 It is usual practice to write into a contract, ongoing contract management clauses which run throughout the duration of the contract and often after it has been executed. This will require the Officer in charge of the contract to know and understand what is written into the contract, so that they can carry out contract management meetings and / or assessments of performance, to ensure the contract is being discharged in the manner expected of the supplier. Where a problem arises, the usual contract procedure would require default notices to be sent to the supplier requiring remedial action. If there is no remedial action arising after service of a default notice, then if the default is of a serious nature, there is sufficient reason to terminate the contract in accordance with the contract procedure. An extremely good working example of this was from Adur Homes. Due to ongoing contract management and the service of regular default notices, the Council was able to terminate early a contract for communal way cleaning without the concern caused

by insufficient documented evidence, of being in breach of contract for the early termination.

- 8.2 Contracts entered into and prepared by the Council should always contain a term clause, defining the length of the contract, and a termination clause entitling termination for breach of contract or for reasons unforeseen beyond a party's control.

9.0 Planning for the end of the contract

- 9.1 It is vital that sufficient planning is made before the end of the contract. This sounds obvious but there have been occasions when contracts have come to an end without sufficient preparation and planning.
- 9.2 If the contract is in excess of the EU Procurement threshold, this could be problematic as these contracts can take up to one year to properly procure, from the project inception meeting to award.
- 9.3 Poor planning for the renewal of an EU contract can render the Council in breach of the EU legislation and put the Council at risk of challenge by potential suppliers for noncompliance with EU principles. The Council can face claims for damages from suppliers and potential fines from the EU Commission. Challenges to Council procedures are increasing nationally and more commonly in the news headlines.
- 9.4 The Council lets many long term service contracts of a below threshold value. Proper procedure would dictate that a least one year to 6 months in advance, the above pre-procurement considerations are put into practice.

10.00 The perceived weaknesses

10.1 Poor value for money

- 10.1.1 If rules and procedures are not followed and there is no forward planning for the procurement exercise, it follows that the most economically advantageous tender will not be properly assessed and value for money may not be achieved.
- 10.1.2 Contracts above the EU Procurement threshold are in many ways less financial risk to the Councils than lower value contracts, as higher value procurements are ideally notified in advance and monitored by the professional Procurement and Legal teams. However for lower value contracts, if the contracting Officer does not follow the CSO procedures and does not notify the appropriate departments, there are limited checks and balances in place to ensure good value for money. It is the Manager's responsibility to ensure value for money is being obtained.

10.2 A lack of proper procedures in place

10.2.1 The Legal and Procurement teams have identified that whilst there is no lack of proper procedure (our Contract Standing Orders are quite detailed and specific) there does appear to be a lack of Officers with sufficient training, knowledge and understanding of the procurement process and CSOs. This has resulted in a small number of consequential failure to comply with the rules, when entering into contracts, extensions or variations of contracts.

10.3 The Council executes badly written contracts

10.3.1 There is a risk that a badly written contract produced by the Councils' Legal Team is executed. This risk is minimal given the skill, knowledge and commercial experience of the Legal Team; the excellent legal resources available to it and the procedure in place for executing contracts.

10.3.2 If a contract has been executed with unfavourable or unexpected terms to the Councils, it will be for one of the following reasons:

- The contract was not drafted by the Councils' legal team
- The contract does not reflect the contracting Officers' full intention, because the Officer has not previously read the contract for which he or she is responsible, or the Officer does not understand the full extent of those terms and conditions
- The Officer has not properly instructed the Legal Department using the Legal Instruction Form and has not complied with the CSOs
- The Officer has asked for generic advice and has not properly convened or explained to Legal either through the use of the form or at a one-to-one meeting, what he is attempting to achieve
- If questions are raised by Legal and not answered, or the advice given is not taken and recommended follow up action is not carried out, there is a risk that an unwanted contract may be presented to a lawyer to sign
- If the signatory does not follow the procedure for signing contracts, does not check the scope of the contract, and does not raise pertinent questions, the risk of an onerous or unwanted contract being executed is increased. This would be a rare occurrence but one which may be created due to a disregard to the rules and procedures

10.4 A lack of effective contract management

10.4.1 Some of our contracts continue in place for a number of years. Officers may not always monitor progress of the contract by reference to the contract terms, may not serve default notices where required and may not plan for the end of the contract term. A lack of contract management throughout the project is poor practice where the contractor's performance is not monitored as well as it should be.

10.5 A lack of pre-contract consideration

10.5.1 Sufficient time needs to be given prior to letting a contract. This consideration will need to include our own Contract Standing Orders but also explore other options that may include challenging the current procurement strategy for the goods or services required. If insufficient time is given or lack of project management, a contract can be rushed.

10.5.2 For example, if no authority is obtained and there are project inception meetings, Legal may raise issues when a contract is presented to Legal to sign. In addition if best value is not obtained, Procurement cannot approve the contract. This can cause frustration to both parties and does not achieve the desired result.

10.6 Officers may bind the Council, not understanding how contracts are formed

10.6.1 To make a contract, there has to be an offer, acceptance, consideration and an intention to create a legally binding contract. This may be done orally or in writing. Officers have in the past, mistakenly signed contracts without referring them to Legal beforehand or agreed contracts over the telephone without realising they were doing so.

11.0 What improvements have been made?

11.1 The Council has recently formed a Procurement Working Group, chaired by a Senior Officer (currently Chief Financial Officer and Section 151 Officer) to consider major procurement projects; how best to introduce social value and make improvements and efficiencies in the way that we procure. This Working Group has been very successful with a number of improvements implemented in the last 6 – 12 months, namely:

- The purchase of a new on-line procurement portal called 'Intend' that can be used by all staff and suppliers (at no charge). The Portal allows for streamlined, more efficient procurement and allows suppliers to register for future contract opportunities. It minimises risk and complies the requirement for all procurements to be conducted transparently and on line.
- The Intend portal will also act as the overarching contracts register for the Council. It has been very difficult to capture a list of all Council contracts and this system will become our central database.
- Following recommendations from the Procurement Working Group a strategic management decision was taken in 2013 to require mandatory training on our Contract Standing Orders. Legal and Procurement teams and our Section 151 Officer worked together and wrote / presented a training session promoting contract management. During the training Officers were required to complete a quiz (attached hereto at **appendix 3**). There has been positive feedback from this training which lasts approximately 3 hours and has promoted discussion of the rules with working examples between Officers. Around 60 staff received this training. Additionally the training should be given to all new senior staff and offered to Councillors.
- Later in 2014, Contract Management training will be rolled out across the Councils and again this will be mandatory for all staff involved in managing contracts, however big or small. It is likely this training will be provided by an external provider and costs met from the corporate training budget.
- Spend analysis – the Procurement team have been compiling a database of Adur and Worthing's spend across all commodities and contracts. The purpose of this is to produce information on our local spend but to also improve how we purchase goods and services and are made aware of all existing contracts in place

- The Councils intranet pages have been updated with information on procurement, Contract Standing Orders and general advice for all staff who are considering letting contracts.

- 11.2 The Councils' have recently, through the Procurement team, actively promoted the use of SME's by engaging with the Federation of Small Businesses and the Chamber of Commerce, explaining how procurement works, and how to use the Intend Portal. For larger contracts these may be broken down into "lots" or segments, so SMEs may be able to respond. Additionally SME's are encouraged to pool their resources for larger contracts. In addition to this the Social Value Act 2012 provides a procurement path to achieving better SME results. There is a risk that using smaller businesses loses economy of scale when procuring goods and services and this is often the tension between using large Government contracts and tendering for goods and services ourselves.
- 11.3 Negotiation with suppliers is actively encouraged, with Officers being trained not to accept the first figure given and to consider negotiating better deals, thereby dispelling the myth that the Councils remain a bottomless money pit. Some negotiations may not be about price but quality of service, or additional service provision such as training etc.
- 11.4 Officers are now aware of the requirement to have supplier standard terms of contract (where supplied) checked by the Legal team and all contracts over £5,000 checked for best value by the Procurement team. This lower financial limit of £5000 was set by Members in 2013 and has led to Officers ensuring they receive competitive quotations and the Procurement team challenging some Departments.
- 11.5 The new Council Leadership Team (CLT) are considering how we can improve our approach to project management, particularly with regard to major projects. The Chief Executive now requires all major projects to be discussed regularly by CLT and that these are closely monitored and managed. This is a standard agenda item now on CLT meetings.
- 11.6 In summary a number of improvements have been made over the last 6 – 12 months with in house working groups, partnership working, better communication, advanced planning, mandatory training and raising awareness of the rules and procedures. The theme has been to actively encourage Officers to consider 'if this was my money how I would spend it' and has had a very positive effect on procurement and the letting of commercial contracts.

12.0 Legal

- 12.1 Under Section 111 of the Local Government Act 1972, the Council has the power to do anything that is calculated to facilitate, or which is conducive or incidental to, the discharge of any of their functions.
- 12.2 Section 3(1) of the Local Government Act 1999 (LGA 1999) contains a general duty on a best value authority to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.

- 12.3 S1 of the Localism Act 2011 empowers the Council to do anything an individual can do apart from that which is specifically prohibited by pre-existing legislation.
- 12.4 S1 Local Government (Contracts) Act 1997 allows the Council to enter into a contract in relation to any of its functions.
- 12.5 In addition to the power under S1 above, the Council must comply with its Contract Standing Orders and the Public Contract Regulations 2006.

13.0 Recommendation

- 13.1 The Committee is recommended to note the contents of this report.

Paul Brewer
Director for Digital and Resources

Local Government Act 1972

Background Papers:

n/a

Contact Officer:

Steve Spinner, Business Services Manager, Town Hall, Worthing
Tel: 01903 221019
e-mail: steve.spinner@adur-worthing.gov.uk

1st September 2014

Schedule of Other Matters

1.0 Council Priority

1.1 Actively encouraging the saving of money and increased efficiencies is a Council priority.

2.0 Specific Action Plans

2.1 None other than the proposals made

3.0 Sustainability Issues

3.1 All matters considered and no issues identified

4.0 Equality Issues

4.1 Matter considered but no issues identified

5.0 Community Safety Issues (Section 17)

5.1 Matter considered but no issues identified

6.0 Human Rights Issues

6.1 Failure to protect property could be construed as interfering with the right to quiet enjoyment of property and possessions

7.0 Reputation

7.1 Proper procurement brings with it reputational issues, particularly as the Social Value Act requires local social value to be considered

8.0 Consultations

8.1 All matters considered and no issues identified

9.0 Risk Assessment

9.1 All matters considered and no issues identified

10.0 Health & Safety Issues

10.1 All matters considered and no issues identified

11.0 Procurement Strategy

11.1 All matters considered and no issues identified

12.0 Partnership Working

12.1 All matters considered and no issues identified