

COMMITTEE Enterprise, Planning and Infrastructure

DATE 31st May 2010

DIRECTOR Stewart Carruth

TITLE OF REPORT Procurement from Social Enterprises and Community Benefit Provisions

REPORT NUMBER: CG/10/110

1. PURPOSE OF REPORT

This Report provides Members with general background information and explores options available to the Council in relation to procurement of goods and services from Social Enterprises. It also looks at the securing of community benefits via the procurement process

2. RECOMMENDATION(S)

2.1 That members note the legal and Standing Orders position regarding the procurement of goods, works and services from social enterprises;

2.2 That Members note the legal and policy issues surrounding the implementation of community benefit clauses within the Council's procurements; and

2.3 That Members instruct officers within Corporate Governance to continue work on the development of a robust corporate policy on the use of community benefit clauses within the Council's procurements, and that the policy is submitted to a future meeting of the Committee for approval.

3. FINANCIAL IMPLICATIONS

There are no financial implications arising from this Report, however the on-going work may impact upon the benefits derived from the Council's procurement processes. Further, compliance with the Council's Standing Orders and the legislation outlined in this Report will in turn ensure compliance with the Council's Procurement and State Aid obligations.

4. SERVICE & COMMUNITY IMPACT

The on-going work outlined in this Report will positively contribute towards the Council's objectives in terms of tackling poverty, deprivation, inequality and other forms of social exclusion. The final policy dealing with procurement from social enterprises and community benefit clauses will be subject to an Equalities & Human Rights Impact Assessment prior to being submitted to Members for approval. The outcome of that assessment will form part of the Report to Members.

5. OTHER IMPLICATIONS

None

6. REPORT

Following a meeting of the Housing and Environment Committee, officers were asked to submit a report on the overall amendment of the Council's procurement procedures to take account of social enterprises. This report outlines the legal and other issues which affect this. It also examines the use of community benefit clauses as a means of securing social benefits from the Council's procurement activity.

Social Enterprises

The Council's procurement procedures are governed by the Standing Orders relating to Contracts and Procurements, the Financial Regulations, and the Corporate Procurement policy. It is important to point out that none of these documents preclude procurement from Social Enterprises. However, the law relating to procurement does not provide the Council with an unfettered discretion in terms of its procurement activity.

The key internal document governing procurement is the Council's Standing Orders relating to Contracts and Procurements ("the Standing Orders"), which were approved by the Council in November 2009 and came into force on 1st April 2010. They were drafted to take account of many developments in the field of procurement law and practice over the last few years. An extensive programme of officer training, which was organised and delivered by the Policy and Advice Team, accompanied the introduction of the new Standing Orders. Briefing sessions are now being run for Elected Members.

In recent years, EU procurement rules have been amended and developed significantly. The EC Consolidated Directive on Public Procurement of 2004 was implemented into domestic law by way of the Public Contracts (Scotland) Regulations 2006 ("the Regulations"), which came into force on 31st January 2006. Furthermore, the EC Remedies Directive, which introduced clear and effective procedures for seeking redress in cases where bidders consider contracts have been unfairly awarded, was implemented into Scots Law as of 20th December 2009 and resulted in the amendment of the Regulations.

The Standing Orders are up-to-date, comply with all relevant legislation, take account of the Council's internal structures and policies, and are fit for purpose and easy to follow. Most importantly, they are compliant with the Regulations. Where the Regulations must apply to a Contract entered into by the Council, the Standing Orders are explicit on this. The Standing Orders also give real flexibility where a Contract is under the European threshold and do not prescribe how Services must procure, so long as that process is fair and transparent.

The Regulations govern regulated procurement within Scotland. They set out the financial thresholds, procedures and timescales which must be adhered to by public bodies when tendering. They aim to ensure that public bodies enter into contracts in a transparent and fair manner, that all potential tenderers are treated fairly and consistently and one organisation is not favoured over any

other. The transferring or purchasing of services by the Council must be done in compliance with the Regulations and with the Council's Standing Orders.

Regulation 7 of the Regulations covers procurements involving "supported businesses", "supported employment programmes" and "supported factories".

- A "supported business" is a service where greater than 50% of the workforce are disabled persons who are unable to take up work in the open labour market.
- A "supported employment programme" means a scheme which provides work for disabled workers and where more than 50% of the workers supported by the scheme are disabled persons and unable to take up work in the open labour market.
- "A supported factory" means an establishment where more than 50% of the workers are disabled persons who are unable to take up work in the open labour market.

Regulation 7 permits the Council to restrict participation in a specific procurement which is covered by the main provisions of the Regulations (in terms of the nature of what is being procured and the values) to supported businesses, supported employment programmes and supported factories. Only organisations of this type would be entitled to bid for that particular contract. It does not allow the Council to directly award a contract to a specific organisation. Instead, the procurement must follow the requirements of the Regulations in terms of advertising and timescales etc

Contracts cannot therefore be reserved for a specific organisation and all bids from supported businesses, supported employment programmes and supported factories submitted under the reserved contacts arrangements must be assessed in accordance with the Regulations. In terms of the Regulations, a contracting authority shall award a public contract on the basis of the offer that either (a) is the most economically advantageous tender from the point of view of the contracting authority, or (b) offers the lowest price (Regulation 30).

If a contract is to be a reserved contract, the advertisement in OJEU must state this. Otherwise, the tender documents will be in the same format as for any non-reserved procurement and the procurement processes will be the same. The only difference is that Regulation 7 allows the Council to restrict the nature of the organisations that can bid.

In deciding whether to reserve a contract, the Council must balance the obvious social benefits of doing so against the statutory obligation to achieve best value. The Council must have regard to the nature of its procurement need and the available market, in order to establish whether supported businesses etc. would be able to meet the Council's requirements, and at the same time deliver best value. In some circumstances, it may be that the social benefits outweigh any additional cost of reserving a contract, or may reduce the demand upon a different budget line. All of these factors must be assessed prior to commencing the procurement process.

Where a contract is below the EU procurement threshold or is for what the Regulations define as Part B Services, then the Council has a greater degree of flexibility. These procurements are not subject to the full requirements of the Regulations. Regulation 8 (21) requires the Council to “*ensure a degree of advertising and follow a procedure leading to the award of the contract which is sufficient to enable open competition and meet the requirements of the principles of equal treatment, non-discrimination and transparency.*” This requirement is restated within the Standing Orders. It means that there still needs to be a degree of advertising and process to ensure fairness and transparency. Once again, it does not enable the Council to directly award a contract to a specific organisation.

The Power to Advance Well-Being

Part 3 of the Local Government in Scotland Act 2003 gives the Council a discretionary power to do anything it considers is likely to promote or improve the well-being of its area and/or persons in it. Before the 2003 Act came into force, the Council could only do such things as it was specifically empowered to do, by specific statutory powers, duties and functions. However, the power to advance well-being is wide-ranging and now enables the Council to do anything that it considers is likely to promote or improve the well-being of the area and/or persons in it without the need for specific legislation empowering it to do so.

However, this power is not without restriction. The Council must exercise it having regard to the law more generally and cannot do anything which breaches a specific law/other legislation applying to the Council in the name of the power to advance well-being. This includes compliance with relevant EU treaty obligations, directives and regulations applicable to procurement and state aided activity. It does not empower the Council to disregard the provisions of the Regulations. Furthermore, the power to advance well-being is also subject to the statutory duty on the Council to achieve Best Value.

Community Benefit Clauses

Something which may enable the Council to achieve wider benefits from its procurements is the use of community benefits clauses. Community Benefits in this context are contractual requirements which deliver a wider social benefit in addition to the core purpose of a contract. In particular, they may focus on requirements in relation to targeted training and employment outcomes. They can be secured either through the procurement itself or through contractual conditions flowing from the procurement.

There is potential for public procurement projects to impact on training, employment and investment in a local community and its longer-term regeneration. Social and environmental requirements can be included in public contracts if they comply with the requirements of the EU procurement rules and general EU law. In particular, they must comply with the EU Treaty Principles of equal treatment and proportionality.

The Regulations at Regulation 39 provide that:

*“(1) A contracting authority may stipulate conditions relating to the performance of a public contract, provided that those conditions are compatible with Community Law and are indicated in –
(a) the contract notice and the contract documents; or
(b) the contract documents.
(2) The conditions referred to in paragraph (1) may, in particular, include social and environmental considerations.”*

The Council would need a legal and policy basis for incorporating community benefit clauses into its procurement processes. The power to advance well-being outlined above may provide scope for the Council to pursue targeted recruitment and training requirements in a way that meets its sustainable development responsibilities, however this must be compliant with the obligation to achieve best value. Members will be aware that best value does not mean lowest price. It is a combination of cost and quality and suitability to meet the needs of the end-user. As stated above, community benefit clauses must also comply with EU procurement rules and the general EU Treaty Principles. The clauses must not result in either direct or indirect discrimination.

The policy rationale may come from the Council's regeneration aspirations, along with commitments within the Single Outcome Agreement and other policies aimed at tackling deprivation, inequality and other forms of social exclusion. This must be clearly evidenced and linked back to EU policies. The appropriateness or otherwise of the use of community benefit clauses must be assessed on a case-by-case basis.

In developing community benefit clauses it is important to involve all relevant officers including legal, procurement and community planning. This ensures that the clauses are robust, safe from challenge, enforceable and require providers to seriously consider how they will implement and report on the requirements. The community benefit clauses should be developed in such a way as to enable tender responses to be compared in a standardised format and community benefit clauses judged solely on objective and measurable outcomes. Once in place, the monitoring of deliverables secured by the community benefits clauses needs to be robust with clearly defined detail.

Scottish Government guidance in relation to community benefit clauses states that these should flow from a general policy. In that regard, Members are advised that officers within Corporate Governance are currently examining how best to incorporate community benefit clauses within the Council's procurement processes. Officers are also examining how best to ensure that procurement processes are not excluding the involvement of small, medium enterprises e.g. by carefully considering the impact that minimum requirements may have on the ability of an SME to participate in a tender process. An officer from Corporate Governance is due to attend the Scottish Government Community Benefits Champion Network on behalf of the Council. Officers are also engaging with other Councils, where the use of community benefit clauses is more developed.

It is envisaged that the outcome of the work outlined above, along with guidance in relation to the use of reserved contracts and contracting with social enterprises generally, will be brought to Members for approval as a stand-alone community benefits in procurement policy or as an addition to the Corporate Procurement Policy. This would be a more appropriate means of addressing these matters, as opposed to amending the Standing Orders. The Policy will cover all applicable procurement activity across the Council. Consequently, it will require input from all Services involved in procurement.

7. REPORT AUTHOR DETAILS

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