

**BUSINESS SUPPORT
OVERVIEW AND SCRUTINY COMMITTEE**

10 DECEMBER 2009

**CONTRACT LETTING IN EXCEPTIONAL
CIRCUMSTANCES**

Portfolio Holder: Councillor Alan Jarrett, Finance
Report from/author: Deborah Upton, Assistant Director, Housing and
Corporate Services (Monitoring Officer)

Summary

On 12 November 2009 Council received a report detailing contracts awarded in accordance with the provisions of Contract Rules 12.1 and 12.2 to deal with the letting of contracts in exceptional circumstances. This report provides the Committee with a high-level justification as to why these exemptions were approved and further supports this through detailed reasoning within the aforementioned attached report (Appendix A). Furthermore, this report advises the Committee of the measures being recommended to service areas to reduce such occurrences.

1. Budget and Policy Framework

1.1 The constitution requires that the Monitoring Officer shall report annually to Council on the number of contracts awarded by directors under delegated powers and reliance on the exceptional circumstances permitted by Contract Rules 12.1 and 12.2.

2. Background

2.1 The report on this matter to Council on 12 November 2009 set out eleven exemption requests. A copy of the report is attached as Appendix A. In view of the potential risks to the Council in permitting exemption requests it was felt that a report regarding the issue should be presented to this Committee with a clear vision to demonstrate how the use of exemptions could be minimised in the future.

2.2 The process and rules governing exemption requests are set out in Appendix A. Analysis of the eleven requests has revealed that seven of the eleven were potentially avoidable. Of these, five were made because the divisions did not allocate sufficient resource and/or time to enable procurements to take place within the Contract Rules. The other two were as a result of not following the correct procurement process and/or requesting support.

- 2.3 The remaining four exemption requests appear to be unavoidable and failure to grant them would have meant service delivery being negatively affected. One of these four exemptions was made to prevent external funding being lost, which would have placed pressure on the Council to cover the losses through capital funds. One was due to the need for emergency works which was unforeseen and for which the urgency of the situation did not lend itself to following a competitive process. The other two exemptions were justifiable single source exemptions on the basis that no alternative and suitable market suppliers were available.

3. Options

- 3.1 In respects to the letting of these exemptions, the Monitoring Officer considered all available and viable options and decision accordingly for each, having regard to the needs of the service to maintain delivery.
- 3.2 The only options available to the Monitoring Officer in relation to these eleven exemptions, as detailed in Appendix A, were to approve or reject. If the decision had been taken to reject the seven exemption requests, this could have posed a huge risk upon the Council in respects to three factors; these being service delivery, reputation and finance. Therefore, the decision making process behind approving these exemptions was a pragmatic risk based approach which looked at whether the risk of these three factors occurring through rejection was greater than through approval.

4. Advice and analysis

- 4.1 It is acknowledged that whilst approval of these eleven exemptions were just in relation to their respective circumstances, nonetheless, steps need to be taken to reduce the frequency of such exemptions in the future. The following approach is proposed to minimise both the risk of approving exemptions and their frequency.
- 4.2 **Lessons learnt** – Strategic Procurement, on behalf of the Monitoring Officer, has provided guidance through a 'lessons learnt' approach, to all divisions requesting exemptions, especially those where exemptions could have been avoided. As part of this 'lessons learnt' approach, Strategic Procurement has advised all divisions of where errors and non-compliance to Contract Rules have occurred and the correct approach that must be adopted for future procurement activity and projects.
- 4.3 **Greater challenge** – The majority of exemptions presented to the Monitoring Officer are sent via managers and officers. There is no record of any scrutiny of these by Portfolio holders, Assistant Directors or Directors. In future, Directors or the Chief Executive will be required to sign off the exemption requests and these will be reported to the Procurement Board. This will present an opportunity for Assistant Directors to be aware of exemptions and procurement activity, and ensure that any lessons learnt are embedded.

- 4.4 **Training and development and revised processes** – Strategic Procurement are in the process of revising procurement processes and rules and as part of this revision, greater emphasis will be placed upon how exemptions are managed and scrutinised. In addition, greater emphasis will be placed on providing more frequent training and development to client department on Contract Rules, Gateway Processes and EU Procurement Regulations. This will overcome issues where client department have sought exemptions where they have not understood current rules and processes.

5. Risk Management

- 5.1 Risks in the interim have been mitigated through the approval of these exemptions as highlighted within Appendix A. However, in the longer term there are potential risks of challenge where contracts are not competitively tendered and are procured via exemptions. This risk is greater enhanced with the incoming amendment to the Public Contract Regulations which is known as the 'Remedies Directive'. This amendment will give greater powers to have let contracts set aside and annulled meaning that the Council could be faced with paying damages to contracted suppliers and aggrieved parties where a compliant procurement process has not been followed. The impact of the incoming Remedies Directive is being considered by the Monitoring Officer and will be taken into account when considering future exemption requests.

6. Financial and legal implications

- 6.1 The legal implications are set out in the report. The costs associated with the contracts were met from approved budgets.

8. Recommendations

- 8.1 Members are requested to consider the report and comment as appropriate.

Lead officer contact

Deborah Upton, Assistant Director Housing and Corporate Services,
Gun Wharf

Tel: 01634 332133

Email: deborah.upton@medway.gov.uk

Background papers

Contract Letting in Exceptional Circumstances – report to Council, 12 November 2009.