

Meeting: Review of Council Procurement Policies and Food and Music Festival

Date: 3 April 2024

Wards affected: All Wards

Report Title: Review of Council Procurement Policies - Food and Music Festival

When does the decision need to be implemented? n/a

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1. Purpose of Report

1.1 This report sets out how the procurement recommendations in the internal audit report on the Food and Music Festival are being addressed.

2. Reason for Proposal and its benefits

2.1 Weaknesses in the due diligence and contract management processes were identified by Internal Audit in relation to the contract awarded to Case Live Limited for the provision of a Food and Music Festival in May 2023.

2.2 The reason for the proposals is to provide assurance the Internal Audit recommendations are being addressed.

2.3 The main benefit of the proposals is to help to ensure the Council has robust, effective systems and processes in place for understanding, mitigating and managing risk of supplier or contract failure, in order to prevent a similar situation occurring in the future.

3. Recommendation(s) / Proposed Decision

1. To support the proposals and to make a decision as to whether Panel require further involvement in reviewing and signing off on the revised policies and procedures being put in place.

Background Documents

Agenda for Overview and Scrutiny Board on Wednesday, 5 July 2023, 5.30 pm (torbay.gov.uk)

Supporting Information

1. Introduction

- 1.1 Following 2 unsuccessful tender processes which sought to appoint a contractor to provide a Food and Music Festival in Torbay, a waiver request was submitted to directly award the contract to Case Live Limited, following discussions with both Case Live Limited and ER Bid who had both submitted tenders through the unsuccessful procurement processes.
- 1.2 The contract value attributed to the waiver request Of £120,000 related only to the Council's direct funding contribution of £40,000 per annum over a 3 year term.
- 1.3 The first event was due to take place at the end of May 2023 and the Council were notified on 26/04/2023 by Case Live Limited that the event was being cancelled as they were going into administration.
- 1.4 As a result of the event being cancelled Devon Audit Partnership were engaged to review the process leading up to the award of the contract and its subsequent management to identify any weaknesses in the processes undertaken and make any recommendations to address those weaknesses.
- 1.5 The Devon Audit Partnership made the following procurement and contract management recommendations:
 - Going forward in order to avoid any potential breach of procurement regulations, it is vital that departments precisely follow any instructions given by the Procurement Team and retain full and accurate records relating to instructions and decisions made.
 - When wording supporting narrative within a waiver, care must be taken to ensure the narrative is clear and reduces the risk of misinterpretation.
 - When contracting, all company information must be consistent throughout to ensure that related due diligence is undertaken on the correct company(ies).

- To ensure robust waiver approval, the information contained within it must be complete and accurate, which may be achieved through the provision of evidence supporting the waiver content.
- The information stated within the waiver must be accurate and challenged by all involved in the approval.
- Due diligence must include a current financial check on the supplier and any related companies regardless of whether it is following a successful tender process or as a result of a waiver process.
- Financial checks must be undertaken and repeated throughout the Procurement processes through to contract award and final signing to address the risk of decisions being made on out-of-date financial information.
- To support accurate decision making, all financial check reports must be shared with all relevant parties.
- In addition to company financial checks, due diligence could include Procurement checks of Companies House information on the supplier and any related companies.
- Contract monitoring must ensure that all contractual obligations are met by the supplier and any non-compliance is recorded and addressed.
- Contract monitoring must ensure that supplier financial resilience flags are robustly considered and actioned accordingly.
- Supplier evaluation and selection must clearly record and consider the suitability of the bid proposal prior to award of contract.
- Contracts such as these should consider inclusion of related public recourse against financial loss incurred.
- Financial Regulations must be reviewed in light of this matter and the new waiver process to ensure there is no risk of misinterpretation of authority to contract award and approval. In addition, consideration should be given to strengthening the waiver due diligence to ensure it is at least as robust as the tender process e.g., requiring exemplar contract information.

1.6 The Public Contracts Regulations 2015 are due to be replaced by the Procurement Act 2023 during the Autumn 2024. This Act will improve the way procurement is undertaken, so that every pound goes further for our public services. This transformation of public procurement represents a big change for all public bodies, creating simpler, more flexible and effective procurement. Work is already underway to ensure the Council has the appropriate skills, systems and processes in place to meet its obligations under the Act and realise its benefits. Some of the review recommendations will be addressed through this work which will necessitate the development and implementation of new policies, procedures, guidance and training materials.

- 2.2 There has been a restructure within the Commercial Services which has resulted in the creation of a number of new posts decision at improving procurement and contract management oversight:
- Deputy Head of Commercial Services – responsible for managing the procurement and contract management function to ensure team resources are allocated appropriately and providing advice and guidance across the team and wider council in relation to the application of public contracts legislation and case law, will be in post June 2024.
 - Policy and Compliance Manager – responsible for ensuring the appropriate policies, procedures, guidance and training tools are in place to support effective procurement and contract management, will be in post May 2024.
 - Commercial Business Partner – responsible for working across directorates to ensure we are able to develop a robust procurement pipeline and that we understand and can respond to individual directorates training and support needs, will be in post April 2024.
 - Data and Compliance – responsible for monitoring and reporting on compliance with Contract Procedures and contract compliance, in post December 2023.

The Deputy Head of Commercial Services, Policy and Compliance Manager and Commercial Business Partner will work with the Head of Commercial Services to implement the new contract procedures and requirements of the Procurement Act 2023.

- 2.3 Legal Services have appointed an interim Commercial Lawyer who assists with contract drafting, advises on contract indemnities and other contractual matters.
- 2.4 Revised Contract Procedures were approved by Council on 22 February 2024 and changes are being rolled out as part of the transforming procurement programme.
- 2.5 The government mandated Selection Questionnaire and Supplier Suitability Questionnaire have been updated to include the requirement for suppliers to submit organisational business continuity and exit management plans as part of the selection process.
- 2.6 Some contract tiering work has been undertaken, classifying contracts as gold, silver and bronze, with ongoing financial tracking of all gold contracts via D&B Finance Analytics. Where concerns are raised in respect of a supplier this is flagged to the client department and Section 151 Officer for action. The contract tiering / risk assessment process will be refined over the coming months – see point 2.7 below. Factors taken into consideration when tiering contracts are:
- How critical the contract is to the Council's operations
 - Impact on local residents, legislative / regulatory / statutory obligations and finances if the contract is not put in place or fails
 - Value and term of the contract
 - Contract management resources available to oversee the contract

- Supply market diversity – both complexity and risk – how easy it would be put a new contract in place if the supplier or contract failed
- Information governance and data protection implications
- Whether TUPE applies to the contract
- Whether the contract safeguarding of children and/or vulnerable adults forms part of the contract
- Any additional risks – including those of a financial nature identified during the tender process

2.7 There are a number of changes which will need to align to the requirements of the Procurement Act 2023 to avoid the need for further change at a later date, however the Cabinet Office training on the Act, which will be essential to the development of new policies and procedures, is set to commence in late April 2024. Whilst work has commenced on these areas policies and procedures cannot be finalised until the training has taken place. The areas we are currently working on which need to be informed by legislation are:

- Revision of financial and supplier due diligence to ensure we are giving due regard to ensuring we are not preventing small and medium enterprises from being able to win Council contracts and that we are taking into account any changes made by Cabinet Office to their Financial Viability Risk Assessment (FVRA) Tool. We will develop a range of financial check options that are proportionate to the contract, taking into account involvement of parent companies and ultimate parent companies, contract risk assessment, bonds / guarantees, ongoing monitoring of financial standing, D&B Finance Analytics reports and tracking, Companies House information, accounts and relevant financial information provided by supplier, along with formal mechanisms for raising concerns with the relevant department and Section 151 Officer.
- Whilst the revised financial assessment process is being developed training has been carried out with the Commercial Services team to ensure consistency of due diligence checking across the tendering and waiver processes, this includes reinforcing the need to carry out checks on parent / ultimate parent companies, involvement of Finance in respect of the inclusion of bonds / guarantees and additional finance checks where necessary and review of Companies House information.
- Development of our contract tiering/ risk tool to establish both procurement and subsequent contract management risks, which will inform the procurement route to market and level of contract management required. Under the Procurement Act there will be requirements for the Council to publish information on our decision making around routes to market and post award in respect of supplier performance, a full understanding of these requirements is important in ensuring we have address all potential risks in a fair and proportionate manner and are not creating barriers to participation for small and medium enterprises.

- 2.8 As set out at 2.2 above resources are being put in place within the Commercial Services team to support pre-procurement decision making and contract management activities and provide greater oversight of contract compliance (e.g., provision of business continuity and exit management plans, insurances, annual accounts etc.).
- 2.9 To support contract management a Contract management Toolkit is being developed, each toolkit will be individual to the contract, ensuring that any specific risks and issues are flagged to the Contract Manager and they how to deal with them.
- 2.10 We are planning to carry out a pilot 'Health of our Contracts' project which will give us insight and assurance around how our contracts are being managed.
- 2.11 Underpinning all of this activity will be a suite of policies, procedures, guidance and training materials to support implementation of the changes.

3. Financial Opportunities and Implications

- 3.1 Financial opportunities and implications relate to mitigation of financial risk, including supplier and contract failure within external contracts.

4. Legal Implications

- 4.1 Changes to Council procurement and contract management processes and procedures must comply with public contracts legislation. For example financial checks must be proportionate to the supplier market, nature, value and risk of the contact and cannot create barriers to participation for small and medium enterprises or new businesses.

5. Engagement and Consultation

- 5.1 Staff across the Council and its wholly owned companies have been involved in informing the changes made through the transforming procurement programme.
- 5.2 As part of the transformation procurement programme current and potential suppliers will be consulted on proposals for revised processes and documents, including new financial check processes as and when they are developed.

6. Purchasing or Hiring of Goods and/or Services

- 6.1 This report relates to processes and procedures that have been or will be put in place by the Council to support the effective procurement and management of external contracts. There is no requirement to consider social value specifically within the proposals.

7. Tackling Climate Change

- 7.1 This report relates to processes and procedures that have been or will be put in place by the Council to support the effective procurement and management of external contracts. There is no requirement to consider carbon reduction specifically within the proposals.

8. Associated Risks

- 8.1 If the proposals are not implemented there is risk that contracts will be awarded without appropriate due diligence checks being which may result in supplier or contract failure.

9. Equality Impacts - Identify the potential positive and negative impacts on specific groups

	Positive Impact	Negative Impact & Mitigating Actions	Neutral Impact
Older or younger people			There is no differential impact
People with caring Responsibilities			There is no differential impact
People with a disability			There is no differential impact
Women or men			There is no differential impact
People who are black or from a minority ethnic background (BME) (Please note Gypsies / Roma are within this community)			There is no differential impact
Religion or belief (including lack of belief)			There is no differential impact
People who are lesbian, gay or bisexual			There is no differential impact
People who are transgendered			There is no differential impact
People who are in a marriage or civil partnership			There is no differential impact

Women who are pregnant / on maternity leave			There is no differential impact
Socio-economic impacts (Including impact on child poverty issues and deprivation)			There is no differential impact
Public Health impacts (How will your proposal impact on the general health of the population of Torbay)			There is no differential impact

10. Cumulative Council Impact

10.1 None

11. Cumulative Community Impacts

11.1 None