

EXECUTIVE DECISION NOTICE

Date of Decision	4 May 2023
Decision Taker(s) Portfolio holder	Andrew Parry
Designation	Portfolio Holder for Assets and Property
Subject Matter	Building Cleaning and Window Cleaning procurement
Decision	That the procurement of the Building Cleaning and Window Cleaning contract is abandoned.
Reason for the Decision	<p>A report was considered by Dorset Council Cabinet on 1 March 2022 concerning a number of procurements including the Building Cleaning and Window Cleaning contract procurement. The report gave approval for the council to procure the contract and delegated authority to award the contract.</p> <p>The commercial and procurement team have provided the attached report with explanation of the procurement challenge raised by one of the unsuccessful tenderers and recommended action to abandon the procurement.</p> <p>I have the following delegated authority, as set out in the Cabinet Report Item 14 and minutes of 1 March 2022, minute 66:</p> <p>“Decision (a) That Cabinet agrees to begin each of the procurement processes listed in Appendix 1 to the report. (b) That in each instance the further step of making any contract award be delegated to the relevant Cabinet portfolio holder, after consultation with the relevant Executive Director.”</p> <p>I have considered and note the findings of the internal review, in particular the concerns about the approaches taken to the scoring of quality and social value questions and to abnormally low tenders, and the uncertainty about whether continuing contracts would be in the council’s best interest or whether issues could be resolved after award or on re-evaluation.</p>

	In exercise of my delegated authority, and in consultation with the Corporate Director for Assets and Property I accept and approve the recommendation to abandon the procurement.
Alternative Options considered and rejected	Continuing with the procurement and re-evaluation of bids.
Consultees	Corporate Director for Assets and Property
Budget Implications	Costs of re-tendering are likely to be significantly less than the costs of litigation
Legal Implications	As set out in the report
Any Conflict of Interest?	none
Reference Documents	Cabinet Report Item 14 and minutes of 1 March 2022, minute 66. The attached report

Rationale for Abandonment of Provision of Cleaning Contract Tender (DN632815)

Following a challenge raised by one of the unsuccessful tenderers in relation to all 3 lots of the tender, the Commercial and Procurement Team, assisted by Legal Services and external advisers, have conducted a detailed internal review of the procedures followed, the documentary records and the outcome.

No proceedings have yet been issued against the Council and legal defences may be available to the specific allegations brought, but as a responsible authority the Council has considered it necessary to check whether its procedures are robust and able to produce a reliable and defensible outcome which achieves the objectives of the tender and is in the Council's best interests.

That review has identified issues with the tender rules and procedures followed which cast doubt on the quality and social value scores awarded, on whether the prices bid by the successful tenderers are sustainable in light of rises to the minimum legal wage and other costs and, therefore, whether the lots have been awarded to the most economically advantageous tenders (MEATs).

The findings of the review include:

- the approach taken to the **scoring of quality and social value questions**:
 - using an averaging mechanism (plus moderation of individual evaluator scores where evaluator scores varied significantly for a particular question) has produced outcomes which may be difficult to defend;
 - the use of averaging as an evaluation mechanism was set out in the ITT for the tender, but has, since the commencement of the tender, been found by the High Court in a different case to result in a breach of the transparency principle (*Bromcom Computers Plc v United Learning Trust* [2022] EWHC 3262 (TCC)) on the basis that it does not result in a consensus rationale for the scores;
 - the content of the standstill letters lacked detail, partly due to the fact that there were no consensus rationales;
 - the records kept by evaluators for the scores awarded also lacked detail; given that the scores differed as between evaluators, it is generally not possible to discern a common view of the Council on either the appropriate score or the reason for the score; in these circumstances it is unclear whether individual scores are justifiable and hence whether the total scores and outcome are defensible;
 - if proceedings were issued against the Council, the outcome would therefore be uncertain and may depend on the approach taken by the Court to reliance on witnesses recalling the reasons for their scores; it is possible, but not clear, that this issue alone could change the tender outcome for one or more lots and result in different winners (which could potentially be the tenderer which has raised the challenge to date as regards one lot or other tenderers depending on the lot and the approach taken by the Court) or potentially result in the set aside of the tender; this would create considerable risk and uncertainty at trial;
 - a further complication is that one of the 4 evaluators has since died and any trial would therefore also raise sensitivities regarding the deceased evaluator;

- given that the tender rules specify the use of averaging and the lack of clarity over moderation, the above issues could not be reliably addressed through a re-evaluation of bids;
- further consideration should be given to the use of a consensus moderation meeting, the role of the moderator, record-keeping and the formulation of consensus rationales and also as to the nature and scope of the quality and social value questions in the tender, as part of the development of the tender evaluation model.
- In addition, concerns were identified over the approach taken to '**abnormally low tenders**';
 - certain clarifications were raised with tenderers with a view to the Council verifying the anticipated hours per site and underlying costs of tenderers as well as the impact of TUPE so as to be satisfied that tenders were not abnormally low and/or unsustainable; this is particularly important given that many of the workers are employed at or near the minimum wage and establishing that bids are based on non-compliance with the minimum wage is a mandatory ground for exclusion under the Regulations;
 - however, the responses received back from the successful and other tenderers were incomplete; the relevant evaluators then formed a view primarily based on the relative proximity of the tendered prices to the expected values rather than being in a position to conduct a cost based review and there is no specific documentary record of their deliberations; this has resulted in a situation of uncertainty as to whether the successful tenderers are sustainable and defensible; again, this does not mean that the threatened proceedings would be successful but it casts further doubt on whether the awards have been made to the MEAT tenderers and whether the contracts entered into would be in the Council's best interests;
 - consideration has been given as to whether the issues relating to sustainability could be resolved after contract award, but any form of further investigation risks a perception of confirmation bias and could be regarded by other tenderers as an unfair second chance and any re-evaluation would be based on incomplete information;
 - certain other issues were raised regarding the related matter of the Council's approach to assessing financial standing and consideration should be given to introducing greater transparency as to the procedures followed in the future (eg as to ratios and tests applied);
 - given concerns over sustainability and financial standing, it is recommended that further consideration should also be given to the size of lots and a robust and transparent methodology for verifying sustainability of tenders;
- it is also likely to be prudent to change the structure of the lots so as to reduce the risk that pricing transparency arising from the feedback in the tender could undermine any retender and also to ensure that the tender rules on multi-lot discounts are clear.

Recommendation

In light of the above review and the costs, resources and uncertainties inherent in maintaining the contract awards in spite of the threatened legal challenge, it is the recommendation of the Commercial and Procurement Team that the tender is abandoned and steps are taken urgently to (a) inform tenderers via the Procurement portal with a brief

statement of reasons, (b) draw up a revised specification, ITT and award criteria in light of the above review (c) retender the contracts and (d) enter into interim arrangements with incumbent providers (to ensure service continuity and reduce unnecessary TUPE costs) pending the retender process. Consideration should also be given to the use of a different team of evaluators and moderators and to the risk and management of any conflicts of interest.

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Dawn Adams
Service Manager for Commercial and Procurement

Dated: 25 April 2023