

PORT PROCUREMENT PROCEDURES

Report of Director of Financial Resources and Head of Law & Governance

1. Purpose of Report

- 1.1 The purpose of this report is to provide Board Members with a general overview of the public procurement rules insofar as they apply to the Port and the procedures for the award of Port contracts which involve the procurement of works, services or goods.

2. Background

- 2.1 As Members are aware, the Council must comply with the European procurement rules when awarding public contracts which exceed certain specified values. These rules are contained in The Public Contracts Regulations 2006. The rules also impose specific overriding obligations on the Council when it undertakes any procurement activity (irrespective of value) to act transparently, in a non-discriminatory manner and to afford equal treatment to all contractors.
- 2.2 However, although the Port of Sunderland is a municipal port, its activities are not covered by The Public Contracts Regulations 2006. Ports are part of the utilities sector which is subject to a separate, albeit similar, European procurement regime which is set out in The Utilities Contracts Regulations 2006 (as amended) (“the Utilities Regulations”).
- 2.3 All harbour authorities in England and Wales that have statutory powers and duties (including under local legislation) are covered by the Utilities Regulations. This includes municipal ports, trust ports and certain privately owned ports. The Council is a harbour authority in its capacity as the owner and operator of the Port of Sunderland under the local Act, the Sunderland Corporation Act 1972 and related ports legislation.
- 2.4 The key provisions of the Utilities Regulations which apply to higher value Port procurements are outlined in Section 3 below. However, in summary the Regulations offer greater flexibility than the equivalent provisions in The Public Contracts Regulations 2006 for non-Port procurements. In particular, there are higher financial thresholds for supplies and service contracts before the Utilities Regulations apply to the Port’s procurement activities.

2.5 In addition, the Council has its own internal Procurement Procedure Rules as part of its Constitution which apply to all Council service areas including the Port. These rules govern the internal procedures for the award of contracts (in particular contracts which are below the thresholds for the Utilities Regulations), authorisation for the award of contracts and any variations/ extensions to existing contracts.

3. Utilities Contracts Regulations 2006

3.1 The starting point is that the Utilities Regulations only apply to higher value Port contracts above the prescribed thresholds. These thresholds were revised with effect from 1st January 2010 and currently stand as follows:-

- **Services contracts (e.g. the procurement of haulage services; consultancy services) £313,694.00**
- **Supplies contracts (e.g. the procurement of new Port equipment and assets such as craneage, vehicles etc) £313,694.00**
- **Works contracts (e.g. the procurement of dredging works; building and engineering works at the Port) £3,927,260.00**

For the purpose of the above, the value of a contract is the estimated total value of the contract to the contractor during the entire contract period.

In relation to goods and service contracts, it should be noted that the threshold for Port contracts is double the equivalent threshold for non-Port contracts under The Public Contracts Regulations 2006.

In addition, the threshold for works contracts, which include dredging and other capital works at the Port, is substantial at approximately £3.9 million.

The procurement of framework agreements where the Port has the right, but not an obligation, to purchase goods, services or works on a call-off basis during the period of the framework are also covered by the Rules. The Port has previously procured framework agreements, including for haulage sub-contract services, as they represent a useful mechanism where the Port can award contracts expeditiously and lawfully without having to undertake a full procurement on each occasion.

3.2 Where the total value of a Port contract exceeds the relevant threshold referred to in Paragraph 3.1, the contract must be publicly advertised to potential contractors in the Official Journal of the European Union (OJEU) and then awarded in accordance with one of the procedures outlined in the Utilities Regulations.

The Utilities Regulations are more flexible than the general public procurement rules with regard to the procedures to be followed for the award of contracts. The Port has the complete freedom of choice between the open, restricted and negotiated procedures (in the case of non-Port procurements the latter procedure can only be used by the Council in very exceptional circumstances).

In addition, the timescales for the submission of tenders can also be accelerated under the Utilities Regulations and reduced to 10 days at the discretion of the Port and without an express requirement to justify to bidders on objective grounds the reasons for the urgency.

In the case of individual procurements, detailed advice on the OJEU procurement procedures and the appropriate timescales will be provided by Corporate Procurement.

- 3.3 There are only a small number of permitted exceptions to the requirement to advertise an above threshold contract through the OJEU. One exception is where the need for the procurement has arisen for reasons of extreme urgency brought about by unforeseen events which render it impossible for the Council to undertake a full and competitive procurement process. This could potentially include a scenario where the need for a port procurement was previously unforeseen and has arisen urgently (e.g. due to a failure of the Port's assets) and any delay could lead to a breach of contract and financial liability to a third party customer or loss of business.

In addition, both works and service concession contracts are excluded from the scope of the Utilities Regulations.

Legal advice would need to be sought before the reliance on any exception.

- 3.4 The importance of complying with the Utilities Regulations has been reinforced by the recent introduction of new and additional remedies which apply in the case of a successful procurement challenge by third parties alleging a breach of the Regulations. Depending on the nature of the breach, the Court can now cancel a contract that has been entered into by the Council and a third party in breach of the Regulations, in addition to awarding damages to the aggrieved third party.

4. The Council's Internal Procurement Procedure Rules

- 4.1 As explained in Paragraph 2.5, the Council has its own internal procurement rules for the award of goods, services or works contracts.
- 4.2 In particular, the internal rules specify the general procedures to be followed for the award of those Port contracts below the European

threshold and not caught by the Utilities Regulations. In such cases, the Council must comply with its overriding procurement obligations to act transparently, in a non-discriminatory manner and to afford equal treatment to all contractors, rather than simply awarding contracts direct to a favoured organisation without any form of competition or opportunity to bid being given to other potential contractors.

4.3 The starting position under the internal Procurement Procedure Rules is as follows:-

- (i) Procurements above £75,000 in value - the contract should be advertised and competitively tendered;
- (ii) Procurements below £75,000 in value - where practicable, at least three quotations should be sought from suitable providers.

4.4 However, in appropriate cases, there is more flexibility regarding the use of exceptions in respect of below-threshold procurements than for above-threshold procurements under the Utilities Regulations.

Rule 5.4 of the Council's Procurement Procedure Rules contains a number of potential exceptions. In relation to the Port, the following exceptions could potentially arise in appropriate circumstances:

- the execution of works or the performance of services in which the personal skill or knowledge of the person carrying out the works or services is of primary importance;
- urgency when (but only if it is strictly necessary) the time required to comply with the internal rules would be prejudicial to the Council's interests and provided that a reason is kept documenting the reasons for the urgency.

In each case, legal advice should be sought before a particular exception is relied on.

4.5 The rules also specify what level of authorisation is required for the award of Port contracts. In summary:

- Port contracts below £250,000 in value can be authorised by the Deputy Chief Executive acting under delegated powers (£100,000 in the case of consultancy appointments);
- Port contracts above £250,000 in value (or £100,000 in the case of consultants) require prior Board approval which is to be sought in advance of the proposed procurement process. In addition, the Board must also approve the use of any exception to the procurement rules in respect of such contracts.

4.6 In addition to the award of contracts, the rules also govern the variation and extension of existing contracts. The ability to vary a contract lawfully in procurement terms depends on the terms of the existing contract and the nature and value of the proposed variation. In addition, variations and extensions should be authorised as follows:

- where the net cumulative value of all variations does not exceed £50,000 or 20% of the original value of the contract (whichever is the lower) by the Deputy Chief Executive;
- where the net cumulative value of all variations is between £50,000 and does not exceed £250,000 or is at least 20% of the original value of the contract (whichever is the lower) by the Deputy Chief Executive in conjunction with the Director of Financial Resources;
- where the variation is equal to or exceeds £250,000 the prior approval of the Port Board is required.

5. Conclusion

5.1 In conclusion, the Port is subject to a specific and more flexible European procurement regime than other Council services. In particular there are higher financial thresholds before the Regulations apply to supplies and service contracts for the Port and greater flexibility in relation to the procurement procedures when the Regulations apply to higher value contracts. In addition, there is scope within the Council's existing internal procurement rules to undertake urgent Port procurements where this is necessary in the commercial interests of the Port.

6. Recommendation

6.1 The Port Board is requested to note the contents of this report.

