

Procurement - follow up of PIDA disclosure

Wirral Council

Audit 2009/10

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Status of our Reports

The Statement of Responsibilities of Auditors and Audited Bodies issued by the Audit Commission explains the respective responsibilities of auditors and of the audited body. Reports prepared by appointed auditors are addressed to non-executive directors/members or officers. They are prepared for the sole use of the audited body. Auditors accept no responsibility to:

- any director/member or officer in their individual capacity; or
 - any third party.
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Summary report

Introduction

- 1 In March 2009 the Chief Executive notified us of a number of concerns which had been raised by a group of staff in Operational Services under the Council's 'Whistleblowing' procedures. The concerns were in respect of the Highways and Engineering Services Procurement Exercise (HESPE) that was undertaken during 2008. An investigation had been carried out by the former Head of Legal Services and feedback was given to the group in March 2009. Following this feedback the group still had some concerns and the Chief Executive asked us to meet with them. The group subsequently raised its concerns with us under the Public Interest disclosure Act 1998 (PIDA). The concerns were in respect of the governance arrangements that operated during the tendering process. At no time was there any allegation or evidence of fraud or corruption.

Background

Public Interest Disclosure Act 1998

- 2 The Public Interest Disclosure Act 1998 (PIDA) created a framework for whistleblowing across the private, public and voluntary sectors. The Act provides almost every individual in the workplace with protection from victimisation where they raise genuine concerns about malpractice in accordance with the Act's provisions. The most readily available protection under the Act is where a worker, who is concerned about malpractice, raises the issue within the organisation or with the person responsible for the malpractice. The intended effect of this provision is to reassure workers that it is safe and acceptable for them to raise such concerns internally. Employers are therefore encouraged to establish proper procedures for dealing with internal disclosures. The Act also sets out the circumstances where the disclosure of the malpractice outside of the organisation is in the public interest and should be protected.
- 3 The Audit Commission and its appointed auditors are prescribed persons for disclosures relating to "the proper conduct of public business, value for money, fraud and corruption in local government and health service bodies". The obligation of the Commission and its appointed auditors to a whistleblower under PIDA is confined to the receipt of disclosures. PIDA neither requires nor empowers the Commission or its appointed auditors to carry out an investigation into the subject matter of any disclosure made or to report the results of any investigation undertaken. However, the Commission and its appointed auditors will consider any information received as a result of a disclosure and determine what action, if any, to take in the context of their existing statutory and professional powers and duties.

- 4 These statutory duties are set out under the Audit Commission Act 1998 in relation to the audit of the accounts and the value for money conclusion and include auditors' powers to:
 - issue a report in the public interest under section 8 of the Act;
 - issue statutory recommendations under section 11 of the Act;
 - issue an advisory notice under section 19 of the Act;
 - apply to the court of a declaration that an item of account is contrary to law under section 17 of the Act; and
 - apply for judicial review under section 24 of the Act.
- 5 Neither the Commission nor its appointed auditors have powers to discipline local authority officers or are able to bring criminal prosecutions against such individuals. Disciplinary action can only be taken by management and/or any relevant professional bodies. Allegations of criminality are usually investigated by the police and can ultimately only be decided by the courts.

Highway and Engineering Services Procurement Exercise (HESPE)

- 6 During 2008 the Council carried out a competitive tendering process for the provision of highway and engineering services (the Highway and Engineering Services Procurement Exercise - HESPE), bringing together several previous contracts in order to rationalise the services. Following the pre-qualifying stage, Cabinet on 13 March 2008 approved a shortlist of seven providers who were invited to submit tenders. Six of those seven providers submitted tenders, including Wirral Council's in-house Operational Services.
- 7 The tender evaluation was carried out and led by the Director of Finance. Cabinet on 16 October 2008 subsequently formally awarded the contract to Colas and the contract came into effect from 1 April 2009. Staff from Operational Services were transferred to Colas under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006).
- 8 During the period when the contract was tendered and let any external challenge by aggrieved bidders could have lead to damages being paid. However, new rules brought the EU Remedies Directive into force on 20 December 2009. These rules are now in the Public Contracts Regulations 2006. Aggrieved bidders have tougher remedies against public authorities that break procurement rules. The UK policy is that only new procurements advertised after 20 December 2009 are subject to the new rules. The High Court will now be able to set aside signed contracts if procurement rules are broken. The changes affect everyone involved in procurement, both procurers and suppliers (see Appendix 3 for more detail).

Audit approach and objectives

- 9 As noted at paragraph 1, concerns were raised with us following an internal investigation. We agreed to carry out this review as part of our existing statutory and professional powers and duties. However, this was not identified as a risk when the fee was originally set. The additional fee for the work completed during the 2008/09 and 2009/10 audit is £20,000.
- 10 Our work built upon the investigation carried out by the former Head of Legal Services and was undertaken in tandem with work that had already been planned in respect of a review of commissioning and procurement as part of our assessment of the Council's use of resources assessment for 2008/09. We:
- reviewed the file provided to us by the Whistleblowers;
 - reviewed the file produced by the former Head of Legal in his investigation;
 - reviewed the robustness of controls and considered whether there was any evidence of, or opportunity for potential fraud or corruption;
 - reviewed compliance with procurement policies, processes and procedures;
 - reviewed the tender exercise and evaluation and carried out extensive checking of the detailed documents;
 - met with:
 - the Whistleblowers;
 - the Director of Technical Services;
 - the Director of Law, HR and Asset Management and the former Head of Legal Services;
 - the 'client' - Technical Services staff;
 - Corporate Procurement staff;
 - Consultants involved in the process;
 - Finance Department staff; and
 - considered the post contract experience.
- 11 Throughout the review we have kept the Whistleblowers and the Director of Legal, HR and Asset Management informed of the progress of our work and the key messages emerging. We also met with and updated the Chief Executive, Deputy Chief Executive and Director of Corporate Services, Director of Finance, and the Chief Internal Auditor at our liaison and Corporate Governance Monitoring Group meetings. In addition, we have consulted with the Audit Commission leads for procurement at both regional and national level and our regional lead for counter fraud.

- 12 Our objectives were to review the concerns raised regarding the HESPE PIDA to:
- consider whether the Council followed proper processes in its conduct of public business;
 - assess the Council's arrangements for achieving value for money in its use of resources; and
 - assess whether we needed to consider taking further action with regard to our responsibilities under the Audit Commission Act 1998.

Main conclusions

- 13 The concerns raised under the PIDA fell into a number of specific areas and our conclusions are as follows:
- Officers' and Directors' involvement in the in-house bid
 - We found no evidence of any inappropriate influence on the outcome of the tendering exercise
 - Communication by officers with potential tenderers between the post-qualifying and tender submission stage
 - We found no evidence that a meeting held between the Director of Technical Services and another senior officer with a representative of the winning firm influenced the outcome of the tendering exercise or was in effect canvassing by an individual firm
 - Declarations of interest
 - Our review confirmed that a conflict of interest form was submitted by the Director but this was done retrospectively. We found no evidence of any information being shared as part of the association.
 - The deliverability of the contract awarded to Colas
 - There is no evidence that the rates in the winning bid will not be achieved but this can only be assessed through the ongoing benefits realisation process.
- 14 Our conclusion is that overall the Council set up proper processes for the procurement exercise for highways and engineering services and there were many areas of good practice. This is also supported by our review of Commissioning and Procurement previously reported to members (see Appendix 1 for an excerpt from that report). There is evidence that the tender evaluation, information provided for decision making and contract awarded were sound. There is no evidence of impropriety by any officers or members. The winning bid was clearly better value for money than the others in terms of both cost and quality. This is a significant achievement considering the size, complexity, uniqueness and nature of the tender exercise which brought together a number of previous contracts and also involved an in-house bid.

Summary report

- 15 However, the issues raised were genuine concerns and our review did highlight some weaknesses including a lack of clarity about separation of duties, inadequate records and documentation and the need to clarify corporate systems for raising and recording potential conflicts of interest. There were also examples of a lack of proper consideration of or disregard of procedures, for example meeting with potential tenderers during the period between the post tender qualifying stage and tender submission.
- 16 These weaknesses potentially left the Council and individuals open to external challenge. If there had been external challenge to the contract by an aggrieved bidder, the remedy could have led to substantial damages being paid and loss of reputation by the Council. Going forward, a new EU Remedies Directive applicable to new procurements advertised after 20 December 2009 means that aggrieved bidders now have tougher remedies against public authorities that break procurement rules. The High Court will be able to set aside signed contracts resulting in delays to services, as well as significant and costly litigation and further procurement costs (see Appendix 3 for further detail).
- 17 The importance of robust procurement policies and procedures and compliance with those procedures and governance needs to be strengthened to ensure the Council promotes the right culture, the risk and incidence of external challenge is managed and the benefits of procurement initiatives are not put at risk. Weaknesses could jeopardise the achievement of benefits resulting from good procurement.
- 18 As reported to the Audit and Risk Management Committee in January 2010 there is evidence that the cost reductions envisaged by the tendering exercise have been achieved. A price and quality 'model' was used to evaluate the tenders received. A 70 per cent cost and 30 per cent quality split was used to support the award of contract decision. The winning bid from Colas was clearly better value for money than the others in terms of both cost and quality. The benefits realisation exercise is ongoing and is being reported to members on a regular basis.
- 19 As noted at paragraph 1, the PIDA concerns were raised with us following an internal PIDA investigation. The Council needs to continually consider the adequacy of its Whistleblowing procedures and how well they are complied with to ensure that individuals have confidence that issues will be fully investigated and lessons learnt.
- 20 There are currently no further actions that we propose to take under the Audit Commission Act 1998. However, we will continue to monitor how well the Council is implementing the lessons learnt from the HESPE tender process.

Detailed report

- 21 The Council set out good arrangements for governance and there were many areas of good practice. However, our recent commissioning and procurement report concluded: 'although the Council has generally put in place a sound framework of policies and procedures these are not always followed or fully comprehensive'. Our work found some examples where there was non-compliance, such as notes of meetings not being recorded during the tender exercise. Also, some procedures lacked clarity, for example, the separation of duties relevant to in-house bids. An excerpt from the report is included at Appendix 1. In particular, recommendation 15 of the report was to 'strengthen the governance arrangements relevant to procurement activity and ensure compliance, in particular clarify roles and ensure full compliance with policies and procedures'.
- 22 This detailed report sets out the concerns raised by the group of employees of the Council that raised the PIDA and highlights the actions the Council needs to take to ensure it is not at risk in future procurement exercises.
- 23 In December 2009 we shared a list of lessons learnt from our review so far and also highlighted good practice. This is included at Appendix 2 and we recommend that the Council uses this to form an action plan to keep members informed of progress and ensure that actions are implemented to strengthen the Council's governance.

Documentation

- 24 Throughout our review we found weaknesses in control over documentation which impacted on the Council's ability to respond to our review and could have hampered its ability to respond to any external challenge from aggrieved bidders.
- 25 **However, our view is that the tender evaluation, information provided for decision making and contract awarded were sound in spite of the weaknesses in documentation.**
- 26 The weaknesses included:
- Some tender documentation was not safeguarded or retained.
 - Some meetings were not minuted or records retained.
 - Documents did not set out clearly roles and responsibilities.
 - There was little clear documentation of why figures had changed or decisions made.
 - There was poor version control over the in-house bid.
 - It was difficult to establish the audit trail and get information and there were delays in providing information to us.

Detailed report

- 27 The standards of evidence need to demonstrate compliance with legislation and provide assurance to members in support of decision making. Formal documentation should include and properly evidence the thought process leading up to agreed decisions.

Issues raised under the PIDA

- 28 The concerns raised by the group of employees focussed on the following:
- Officers' and Directors' involvement in the in-house bid.
 - Communication by officers with potential tenderers between the post-qualifying and tender submission stage.
 - Declarations of interest.
 - The deliverability of the contract awarded to Colas.

Officers' and Directors' involvement in the in-house bid and tender evaluation

- 29 Concerns were raised regarding which officers should be involved in the in-house bid and whether those who were could be seen to influence the outcome of the tendering exercise.
- 30 **We found no evidence of any inappropriate influence on the outcome of the tendering exercise. However, it is important to ensure in future that there is clarity about the specific governance arrangements to ensure that officers and members are clear about roles and there is no actual or perceived conflict.**
- 31 In particular it is important that the role of the Director of the service subject to tender is agreed in advance and is approved formally through Cabinet with a clear statement on involvement in any in-house bid and the tendering exercise generally. The Director has the responsibility to both deliver any future in-house contract without incurring a deficit and ensure that the tendering exercise achieves the Council's objectives at a competitive rate. Members have responsibility for ensuring they understand and can challenge the governance arrangements.
- 32 Although there was a report to Cabinet regarding governance arrangements in respect of the in-house bid, it was silent on the specific role of the Director of Technical Services. However, the Director of Finance was responsible for the evaluation of the bids and there is no evidence that the Director of Technical Services was involved in this process. We reviewed the various versions of in-house tenders and it is clear that the tender was made more competitive through the Director of Technical Service's involvement and was comparable to many of the other tenders. We also reviewed individual rates that appeared lower than the in-house bid and were satisfied that there were similar rates in other tenders or that the rates were confirmed with the firms.
- 33 However, we found weaknesses in record keeping and version control which meant significant work was needed to establish an adequate audit trail and this potentially left the Council and individuals vulnerable to challenge.

Issues raised under the PIDA

- 34 It is also important that the roles and responsibilities of others involved in the process including consultants and Internal Audit are clearly understood and documented and any changes recorded. We found some lack of clarity around the role of consultants advising on the in-house bid and then being involved in contract management. A representative from Internal Audit was on the project team and also carried out work classed as consultancy, focussing on the arrangements around the in-house bid to ensure it could not be perceived to have had any advantage over external bidders. It is important that it is clear that the primary role of Internal Audit is to provide assurance over the whole control environment, covering both the in-house bid and the overall tendering process and set this out in a detailed assignment sheet.

Communication by officers with potential tenderers between the post-qualifying and tender submission stage

- 35 Concerns were raised with us that a meeting was held by the Director of Technical Services and another senior officer with one of the tenderers between the post qualifying stage and tender submission.
- 36 **We found no evidence that this meeting influenced the outcome of the tendering exercise or was in effect canvassing by an individual firm.**
- 37 However, the meeting was not minuted and so there is no formal record of what was actually discussed. The Director of Technical Services and the other senior officer indicated that the reason for the meeting was to clarify whether tenderers could bid for both the main tender and for the sub-contract work for the in-house tender. Holding this meeting and failing to record it was clearly inappropriate and contrary to procedure and put the Council at risk of non-compliance with procurement regulations and the tenderer at risk of disqualification.
- 38 The invitation to tender clearly specifies the procedure for enquiries from potential tenderers in order for the process to be open and fair for all concerned and to ensure there is no canvassing which would result in disqualification from the tendering exercise:
- All points of clarification to be addressed in writing to the nominated officer for the bid - the Assistant Director, Highways. Our review found no evidence of any written request from the tenderer.
 - All correspondence should be through the nominated officer for the bid and logged to ensure all firms have fair access. Our review found no response posted for the benefit of other tenderers regarding the issue of whether tenderers could bid for both the main tender and for the sub-contract work for the in-house tender following this meeting.
 - Any meetings with individual tenderers must be approved by the nominated officer for the bid. Our review found no evidence of any request by officers to the Assistant Director, Highways that a meeting be held with the tenderer.

- 39 The situation was exacerbated by the lack of clarity around the role of the Director of Technical Services and by the fact that there were no procedures to deal with any meetings with existing contractors who might be placing bids. However, the fact that the meeting was held openly in Council offices, albeit there is no formal record of discussions, helps to mitigate the risk of any improper conduct.

Declarations of interest

- 40 Concerns were raised with us that the Director of Technical Services had failed to declare a potential conflict of interest regarding a personal friendship with an individual in one of the firms bidding for the contract.
- 41 **Our review confirmed that a conflict of interest form was submitted by the Director but this was done retrospectively. We found no evidence of any information being shared as part of this association.**
- 42 The Director of Technical Services completed a conflict of interest declaration on 11 November 2008 and submitted it to the Chief Executive to be considered at his next annual Key Issues Exchange (KIE) meeting which was held in November 2008. However, it was following the award of the contract (16 October 2008) and should have been submitted and discussed with the line manager at the start of the tendering process. In addition, as the tenderer was an existing contractor, there should have been existing annual declarations on file. This retrospective declaration has clearly allowed the relationship between the Director and the individual to be viewed with suspicion.
- 43 The Director of Technical Services indicated that the individual in the firm is an acquaintance who is a close friend of his brother who had previously worked for the firm. Although the Director was aware that the individual worked in the firm he judged that there was no conflict to declare. Once he became aware that the individual would be involved in the contract going forward the Director submitted his conflict of interest form in line with his judgement and his interpretation of the Council's procedures.
- 44 However, Council procedures clearly state that in order to manage conflicts of interest (including any perception of a conflict), employees should complete the form even if there is nothing to declare and return it to their line manager at the KIE and any amendments should be made immediately. During our review we found no evidence of any annual declarations of interest for the Director prior to the one submitted on 11 November 2008 apart from those covering the period when his brother worked for the firm. However, the absence of annual declarations was not unusual in the Council at that time and was raised as an issue in Internal Audit reports during 2008 and a memo dated March 2009.

Issues raised under the PIDA

- 45 The key issue is whether the Director or his line manager should have made the judgement about whether and when a potential conflict should be declared. Our view is that it was the responsibility of the Director to make the line manager aware of his 'acquaintance' when the firm first contracted with the Council and this should have been reviewed when the tendering exercise started and the firm received an invitation to tender. The judgement about whether it was a conflict (or a possible perceived conflict) then rests with the line manager and arrangements could have been put in place to ensure that it was appropriately managed and any 'perceptions' of conflicts rebuttable.
- 46 As noted above, the absence of annual and updated declarations as well as poor evidencing of review and consideration by line managers was not unusual within the Council. We also found during this review that there were weaknesses in the procedures around the employment of consultants, for example ensuring sign up to confidentiality clauses and completion of conflict of interest forms and supporting consideration (one of the consultants had previously worked for the winning firm).
- 47 We are aware that the Council has strengthened the process during the period of our review. It is also important that senior officers take a leadership role by conducting themselves as role models for others within the Council to follow, as set out in the Standard of Conduct.

The deliverability of the contract awarded

- 48 Concerns were raised with us that some elements of the winning bid were very low cost and will prove unachievable in practice.
- 49 **There is no evidence that the rates in the winning bid will not be achieved but this can only be assessed through the ongoing benefits realisation process.**
- 50 We carried out an extensive review of all the tenders at the detailed item level. There were only a very limited number of rates that were not similar in at least two of the bids and all of these were checked and confirmed back with the tenderers by the evaluation team led by the Director of Finance. In addition, 'client' engineers reviewed the reasonableness of rates. There is no evidence that any of the external tenderers were privy to any information that would have given them any advantage.
- 51 As reported in our report to the Audit and Risk Management Committee in January 2010 there is evidence that the cost reductions envisaged by the tendering exercise have been achieved. A price and quality 'model' was used to evaluate the tenders received. A 70 per cent cost and 30 per cent quality split was used to support the award of contract decision. The winning bid from Colas was clearly better than the others in terms of both cost and quality. The benefits realisation exercise is ongoing and is being reported regularly to members.

Recommendation

- R1** Strengthen procurement and general governance policies and procedures to ensure the Council promotes the right culture, the risk and incidence of external challenge is managed and the benefits of procurement initiatives are not put at risk
- Use the 'Lessons Learnt' from this review (Appendix 2) to form an action plan to keep members informed of progress and ensure actions are implemented.
 - Ensure compliance testing is carried out and reported throughout the exercise.

Whistleblowing process

- 52 The Council has recently clarified and updated its Whistleblowing process following a previous PIDA in respect of Adult Social Services. In our work on the Ethical Governance Diagnostic reported to members in last year's Annual Audit Letter concerns were raised by staff regarding the culture of the Council in supporting members and officers who make allegations of misconduct to ensure:
- there is no fear of reprisal;
 - they can be confident in the action they should take; and
 - they can be assured that inappropriate behaviour is suitably dealt with.
- 53 The Council has increased awareness of the Whistleblowing Policy and re-enforced assurances that reporting through this mechanism can be done without fear of reprisal. However, for the individuals concerned, it has been a largely negative experience and all would seriously question whether they would do so again.
- 54 This is also the second PIDA that has been brought to us following an internal investigation that has not satisfied the whistleblower(s). This has resulted in additional work and an additional fee in both cases.
- 55 The Council needs to continually consider the adequacy of its Whistleblowing procedures and how well they were complied with to ensure that individuals with genuine concerns have confidence that issues will be fully investigated and lessons learnt.

Recommendation

- R2** Consider the adequacy of the Whistleblowing procedures and how well it is complied with to ensure that individuals can have confidence that they will be safeguarded, issues will be fully investigated and lessons learnt.

Appendix 1 – Excerpt - Commissioning and procurement report December 2009.

Starting at paragraph 75 of original report:

- 75 The HESPE contract provides the Council with an opportunity to improve services at the same time as delivering financial savings. The tender process has employed best practice techniques and contemporary contracting practice. It is too early to determine if the envisaged benefits will be realised although procedures are being refined to ensure this is monitored.
- 76 The Council's objectives and priorities have been specifically recognised as part of the HESPE procurement process. This is to ensure the new contract contributes to the achievement of the Council's aims going forward. The new contract is intended to make best use of available resources and achieve an enhanced and responsive customer focused service. The contract covers various aspects of maintenance work on highways, drainage and coastal infrastructure. It is too early to confirm that the contract is delivering improvement to customer experience, quality and value for money.
- 77 An important part of the HESPE procurement process has been the consolidation of various packages of work delivered through a number of contracts into one single contract. This was intended to provide more competitive contract pricing, along with internal efficiencies resulting from streamlined contract management arrangements. Relevant budgets have been reduced to reflect anticipated financial savings resulting from the new contract which commenced in April 2009.
- 78 A Project Initiation Document (PID) has been used to provide a structured basis for managing the HESPE procurement process. Also, Gateway Reviews have been undertaken throughout the project to ensure the process was in line with best practice and identify lessons learnt. Gateway Reviews were previously used on the revised environmental waste services contract.
- 79 The HESPE procurement exercise has taken account of various potential contract strategies. This was the basis of the decision to move from a traditional contract to a partnering form of contract. An outline business case was prepared along with other supporting documentation, including an options appraisal. External consultants were employed to ensure a comprehensive review was undertaken, including taking into account the arrangements used by other councils.
- 80 Where relevant consultants have continued to be used to supplement lack of capacity within the Council. Additional external resources have been used during the early stages of the procurement process and subsequent tender

- exercise following agreement of the contract strategy. Also consultancy support is being used during the early part of the contract management stage following commencement of the contract. This requires the ordering, delivery and management of services to be redesigned.
- 81 The HESPE tender exercise included a comprehensive quality element in addition to consideration of cost. Method statements were used to assess the quality of bids, including use of ICT to provide a better customer service, plus use of innovation and technology to drive continuous improvement.
- 82 Expressions of interest leading to submission of tenders were received from a number of external contractors. An in-house bid was also submitted by the Operational Services Department (OSD). A price and quality 'model' was used to evaluate the tenders received. A 70 per cent cost and 30 per cent quality split was used to support the award of contract decision. The winning bid from Colas was clearly better than the others in terms of both cost and quality.
- 83 Governance was given specific attention during the HESPE process. For instance a reporting hierarchy was created to link the Project Team to members via a Project Board. Internal Audit were commissioned to undertake reviews of the process and made permanent members of the Project Team. Detailed procedures were also created such as separate arrangements for evaluating the cost and quality elements of tenders. Also specific governance arrangements were approved by Cabinet for the in-house bid. However, our work has found examples where procedures lacked clarity, for example, separation of duties relevant to the in-house bid or there was non-compliance, for example, notes of meeting not being created. Compliance with procedures and robust governance are fundamental requirements of effective procurement. This is necessary to ensure the risk of external challenge is managed. Weaknesses could jeopardise the achievement of benefits resulting from good procurement.
- 84 Risk management has been undertaken as part of the HESPE procurement process. Also, risk management has been rolled forward to the contract management stage following contract award. Both high level risks and detailed commercial risks are being addressed. These risks are to be routinely reported to the Colas/Wirral Partnering Board meeting which is held on quarterly basis. Detailed risk management issues are considered at the monthly Colas/Wirral Liaison meeting.
- 85 The performance of the HESPE contract in providing a responsive service to meet statutory obligations and customer requirements is to be monitored and driven through the Performance Management Framework with Key Performance Indicators (KPIs) under four headings: Planned Work, Reactive Work and Emergency Response, Contract Management and Customer Focus.

- 86 The first five KPIs come into effect from the 1 July 2009 and cover reactive elements, emergency works, Priority 1 and 2 work. These PIs will be monitored in detail each week and then feed into the monthly Liaison Meeting with the contractor. Other PIs are subsequently to be developed as part of contract management. This should ensure there is a focus on improving relevant highway condition Best Value/National Indicators. At present it is too early to determine whether the contract will deliver the envisaged improvements.
- 87 Colas are to be invited to give a presentation on the first six months of the HESPE contract to the Sustainable Communities Overview and Scrutiny Committee.
- 88 A benefits realisation process is an integral part of the HESPE procurement exercise. A procedure has been drafted to ensure there is a formal methodology in place for measuring the delivery of anticipated benefits during the life of the contract. An external consultant is providing additional capacity during the initial contract management stages.
- 89 Part of this work includes firming-up the project objectives to establish measurable targets to enable a robust evaluation of benefits to be undertaken. Ownership of specific aspects of the benefits realisation programme is also being assigned. This includes action by the client, where applicable, to enable Colas to deliver benefits, for example, upgrade of ICT systems, timely agreement of budgets and specification of works by the Council to enable jobs to be planned and packaged efficiently by Colas.

Recommendations in original report

- R12 Ensure the HESPE contract is routinely evaluated to ensure the financial and other benefits are delivered over the life of the contract. Ensure attention is given to the role of the client, in addition to the contractor, to ensure benefits are delivered.
- R13 Continue to develop risk management as part of the contract management arrangements for the HESPE contract, in particular risk associated with delivery of financial and other benefits.
- R14 Ensure the performance management arrangements for the HESPE contract are fully implemented.
- R15 Strengthen the governance arrangements relevant to procurement activity and ensure compliance, in particular clarify roles and ensure full compliance with policies and procedures.

Appendix 2 – Lessons learnt - note to officers December 2009

Lessons learnt applicable to current PACSPE (parks & countryside service procurement exercise)

- clear message required that Council needs to be able to respond effectively to external challenge. Note, since HESPE more extensive legal/procurement requirements to be introduced (on 20 December 2009) as part of Remedies Directives
- standards of evidence to demonstrate compliance with legislation and provide assurance to members in support of decision making. Formal documentation to include thought process leading up to agreed decisions
- ‘exemplar role model’ message needs to be reinforced. Standard of Conduct: “senior officers are expected to exercise leadership by conducting themselves as role models for others within the Authority to follow”
- ensure compliance with Code of Conduct, including Declaration of Conflicts of Interest procedure – annual statement (M15) to be completed even if no conflict to declare, and returned to manager at KIE. Any changes to be notified immediately
- in conjunction with potential Conflicts of Interest, line management responsibilities of relevant officers should be reviewed to ensure ‘separation of duty’ controls are effective
- officers to clearly set out governance arrangement in relevant committee papers. Members to recognise the importance of governance and challenge accordingly, in addition to ensuring proposals are aligned to the Council’s priorities and will provide better value for money
- comprehensive procurement procedures – strengthen re support for in-house bids, tender evaluation/use of ‘model’, role of CPU including in-house bid

- Corporate Procurement Unit (CPU)
 - separation of duties re main contract and in-house tender
 - Declaration of Interest by CPU staff – reviewed and approved
 - ‘shared drives’ created with specific access control for main contract and in-house bid

- adequate capacity
 - main contract: review capacity at start of project and again once contract strategy has been agreed e.g. partnering contract, to ensure appropriate skills and expertise are available to maximise the benefits. Ensure roles and responsibilities are clear and achievable. Strong message at outset that involvement is not optional e.g. attendance at meetings
 - in-house bid: review capacity as part of submission of proposal to include an in-house bid in the tender exercise
 - post contract award/contract management stage – recognise potentially different skill set required to implement operating procedures and control systems under new contract
 - downsizing of in-house 'client function' after contract award: delivery of savings whilst maintaining adequate controls systems

- use of consultants:
 - provision of confidentiality clause within contract – consistency: corporate template needed
 - Declaration of Interest followed by evaluation of appropriateness of arrangements
 - compliance with contract procedures/rules regarding engagement of consultants e.g. tender process
 - movement between different stages of the process e.g. supporting bid vs. contract management – assessment of confidentiality issues to be reviewed at approved for each piece of work

- Business case/ options appraisal
 - links to Council's objectives and priorities clearly stated
 - detailed outcomes established to support subsequent monitoring of benefits
 - specific performance measures identified e.g. KPIs (to be captured in PM system & other performance monitoring systems) – to be created timely during procurement rather than once into contract management stage. Also, to be used as part of ITT process and evaluation of tender bids
 - both financial and non-financial outcomes covered, in detail

- In-house bid
 - specific governance arrangements, including full clarity on role of director
 - role of director to be transparent with approval through Cabinet. Clear statement on whether the director will or will not be involved in any in-house bid. If not involved then alternative arrangements should be clearly stated and approved, including responsibility for approving the bid prior to submission (balance between competitive rates and subsequent delivery without deficit)

Appendix 2 – Lessons learnt - note to officers December 2009

- clarify role and responsibility of team members, including consultants and IA
- ‘Version’ control during compilation of bid, with relevant documents retained
- assumptions re in-house and sub-contract elements of the bid recorded and approved
- details of approach to use of sub-contractors recorded e.g. uplift, lowest bid etc
- clear separation within internal departments: separation of ‘client’ and ‘provider’ functions

- tender process
 - procedure to address potential canvassing – specific provision for existing contractors of the Council
 - all correspondence processed through specific procedure e.g. Data Room and nominated person
 - any contact/meetings during tender process recorded and subsequently reviewed/approved
 - Points of clarification logged – transparency re other contractors
 - retention of contract documents – responsibility clear

- responsibility for evaluating bids:
 - separation of duties e.g. which director takes lead responsibility
 - dedicated evaluation teams: stable membership maintained – record of work done and conclusions created and retained
 - involvement of ‘experts’ to be documented, review by relevant ‘client’ manager e.g. sustainability of rates in context of technical evaluation: reasonableness check
 - control over design and information in ‘model’ e.g. cost vs. quality split – ‘model’/‘basket’ to be challenged to ensure no subsequent changes required, especially during evaluation of bids stage
 - use of firm or indicative quantities to be approved (integrity)
 - records to confirm accurate input of rates to model retained
 - process for financial evaluation to be approved – actual rates vs. average rates
 - financial and technical/quality appraisal separate then consolidated prior to recommendation regarding contract award
 - approach to points of clarity following tender submissions and evaluation e.g. integrity of rates – face to face interview procedure for clarification or formal written approach. Decisions on approach recorded.

- benefits realisation process
 - benefits realisation strategy to be approved during tender stage, supported by detailed outcomes and appropriate performance measures. This should confirm that high level objectives have been properly thought through at the detailed level to ensure outcomes can be routinely measured
 - appropriate attention to role of Council as well as contractor in delivering benefits. Where appropriate part of tender specification. Relevant departments within Council to have confirmed assumption are achievable e.g. implementation of new ICT systems
- appropriate checks to confirm compliance with Council's policy and procedures
- role of Internal Audit (IA)
 - clarity that the primary role of IA is to provide assurance over the control environment, supported with agreed terms of reference, scope of audit, including attending project meetings. Any consultancy work to be clear to ensure there is added value and no conflict with the routine assurance role
 - work done and findings recorded, including outputs from attendance at project meetings
 - both main contract & in-house bid to be covered
 - specific review of role of decision makers and use of consultants
 - risk management during tender and beyond – including risk associated with delivery

Appendix 3 – Remedies for breaches of procurement law

- 1 During the period when the contract was tendered and let any external challenge by aggrieved bidders could have lead to damages being paid.
- 2 However, new rules brought the EU Remedies Directive into force on 20 December 2009. These rules are now in the Public Contracts Regulations 2006. Aggrieved bidders have tougher remedies against public authorities that break procurement rules. The UK policy is that only new procurements advertised after 20 December 2009 are subject to the new rules.
- 3 The High Court will now be able to set aside signed contracts if procurement rules are broken. The changes affect everyone involved in procurement, both procurers and suppliers.

Key changes

- 4 There are four key changes.
 - The High Court can set aside a signed contract.
 - The procurer must provide more information about their decision at the start of the standstill period. The standstill period is the compulsory length of time a body must wait before awarding a contract after a tender exercise.
 - Contracts cannot be entered where an application has been made to the court challenging the contract.
 - Procurers can voluntarily use a standstill period as a precaution to prevent a contract from being set aside.
- 5 If an unsuccessful bidder applies to the High Court and the court decides that a contract award breached specific EU procurement rules, it can set aside the contract. A contract can be set aside where:
 - there was a direct award without advertisement and competition, in breach of procurement rules (including above threshold call-offs under frameworks); or
 - there was failure to abide by the mandatory standstill period.
- 6 Aggrieved bidders usually have six months to bring an action. However, public authorities can reduce the time limit to 30 days by telling the bidders its award decision. It is likely to be standard practice to reduce the time limit for a challenge to 30 days.
- 7 The High Court can shorten contracts and impose fines rather than set contracts aside where it thinks this is more suitable.

Mandatory standstill

- 8 For contracts subject to the full procurement rules, when a public authority decides who it will award the contract to, it must:
 - tell the unsuccessful bidders and provide reasons for the decision;
 - wait for 10 days before entering the contract (if using electronic or fax communication, otherwise this increases to 15 days) this is the Alcatel or standstill period;
 - answer questions during the standstill period and suspend the procurement if asked to review the decision.
- 9 Authorities can use the standstill period and publish an award notice in cases where this is not legally necessary ('voluntary standstill') to protect contracts from 'ineffectiveness'. This only applies where it is not clear if the contract is subject to the full procurement rules, not where the authority has intentionally broken the rules.

Legal challenge during standstill period

- 10 During the standstill period an aggrieved bidder can question and challenge the award decision. The contracting public authority must suspend the procurement automatically when a bidder asks it to review the contract award decision. On application to the High Court the public authority is also automatically prevented from entering the challenged contract. Public authorities can apply to the court to have this lifted
- 11 The practical implications of this are that contracts can be set aside where there has been a direct award of a contract without competition, in breach of procurement rules or failure to satisfy the mandatory standstill period. The full impact of this on contract law remains to be seen as it will be possible for contracts to be set aside even once they have been awarded.

Possible impact on public authorities

- 12 Contracting public authorities will be subject to risks of delays to their services, goods and works where a contract is challenged before it is entered.
- 13 After a contract has been signed authorities are exposed to significant and costly litigation if they fail to comply with the EU procurement rules. Successful bidders are likely to want assurances and indemnities in contracts with authorities against the possibility of their contracts being set aside.
- 14 The standstill period can be useful as a shield from 'ineffectiveness'. Where the rules are unclear, one would expect authorities to publish contract award notices as a precaution and having a standstill period before awarding the contract. A voluntary notice protects unadvertised procurements.

Appendix 4 – Action Plan

Page no.	Recommendation	Priority 1 = Low 2 = Med 3 = High	Responsibility	Agreed	Comments	Date
Procurement - follow-up of PIDA disclosure on HESPE contract						
12	<p>R1 Strengthen procurement and general governance policies and procedures to ensure the Council promotes the right culture, the risk and incidence of external challenge is managed and the benefits of procurement initiatives are not put at risk</p> <ul style="list-style-type: none"> • Use the 'Lessons Learnt' from this review (Appendix 2) to form an action plan to keep members informed of progress and ensure actions are implemented. • Ensure compliance testing is carried out and reported throughout the exercise. 	3				
13	<p>R2 Consider the adequacy of the Whistleblowing procedures and how well it is complied with to ensure that individuals can have confidence that they will be safeguarded and issues will be fully investigated and lessons learnt.</p>	2				

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