



STANDING ORDERS

TOWN COUNCIL MEETING

REPORT 74/20

14 SEPTEMBER 2020

The purpose of this Report is to provide the information relevant to Members' decisions in respect of the Procurement section of the draft Standing Orders.

No. DETAILS

1) BACKGROUND

- a) Section 135(2) of the Local Government Act 1972 states: *A local authority shall make standing orders with respect to the making by them or on their behalf of contracts for the supply of goods or materials or for the execution of works.*
 - b) The Town Council's current Standing Orders were adopted in 2011 and do not reflect the changes in the Procurement practice in *The Public Contracts Regulations 2015 Part 4, Ch. 8 Reg 110.*
 - c) Discussions with Councillor Colm Watling have helped to clarify the additions or amendments that could be incorporated in the current draft document.
 - d) Each of them is identified in the following sections of this Report with additional information where relevant.
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2) CONTRACTS IN EXCESS OF £25,000

- a) The Regulations require that any contract in excess of £25,000 must be listed on the Government's Contract Finder website *if* it is advertised anywhere.
 - b) There is no legal requirement that they *must* be advertised and *ad hoc lists* can be used as Regulation 110(5)(b) states:
a contracting authority does not advertise an opportunity where it makes the opportunity available only to a number of particular economic operators who have been selected for that purpose (whether ad hoc or by virtue of their membership of some closed category such as a framework agreement),
 - c) The legal position was clearly stated in Report 66/20 to the Town Council's August meeting, confirmed by the two linked documents – formal advice from the Hampshire Association of Local Councils and Anthony Collins Solicitors - and for the avoidance of doubt these are attached to this Report.
 - d) However, the Town Council is, of course, free to decide that its Standing Orders should include a clause stating that all contracts over £25,000 must be advertised with a consequent requirement to list them on the Contracts Finder Database
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3) SOCIAL VALUE ACT

- a) The *Public Services (Social Value) Act* became law on 31 January 2013 and *requires people who commission public services to think about how they can also secure wider social, economic and environmental benefits.*
 - b) The Town Council is advised to include clauses to deliver on that requirement in its revised Standing Orders whether or not it determines to advertise contracts as described in section 2 above.
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4) CONTRACTS UNDER £25,000

- a) The current draft Standing Orders – following the National Association of Local Council's Model – includes as one of the requirements that the Town Council should consider for its Financial Regulations is *whether contracts with an estimated value below £25,000 due to special circumstances are exempt from a tendering process or procurement exercise.*
 - b) However, I agree with Councillor Colm Watling's proposal that Standing Orders should include a clause to the effect that contracts lower than £25,000 and above £5,000 should be
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subject to three tenders.

5) EVALUATION SCHEME

The proposal to develop a Tender Evaluation should be agreed in order to ensure fairness in decision making about rating received tenders.

6) DETERMINATION BY PRICE

- a) The current draft reflects both the National Association of Local Council's Model and our existing Standing Orders in specifically stating that there is no obligation to accept the lowest tender.
 - b) This makes sense, particularly given the commitment to take account of the provisions of the Social Value Act and the relative social and environmental benefits between the received tenders.
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7) RECOMMENDATION

Members are recommended to:

- i) Agree to include in the draft Standing Orders clauses to:
 - o develop and apply a Tender Evaluation Scheme
 - o include a reference to the *Public Services (Social Value) Act* and incorporate it is provisions in the Tender Evaluation Scheme; and
 - o add a requirement to secure three tenders for all contract of value between £5,000 and £25,000;
 - ii) Determine whether or not contracts in excess of £25,000 should be advertised and, consequently, added to the Contract Finder database; and
 - iii) Ask the Clerk, in discussion with the Mayor and Councillor Colm Watling, to draft appropriate clauses to reflect the above decisions.
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From: [Advice - Hampshire ALC](#)
To: ["Ventnor Town Clerk"](#)
Subject: RE: procurement advice please
Date: 02 July 2020 09:51:24
Attachments: [image001.png](#)
[image002.png](#)
[image004.png](#)

Dear David,

When a council advertises a contract award opportunity with an estimated value of £25,000 or over (NETT), it must publish information about it on Contract Finder regardless of other ways in which the opportunity is advertised.

But, if the council is not advertising an opportunity as it is making the opportunity available only to a number of particular contractors, as you mention the council intends to, the council can publish the details on the Contracts Finder, but is not required to do so.

It is worth noting the legislation 'The Public Contracts Regulations 2015 Part 4, Ch. 8 Reg 110, found [here](#) in full, which states:

(4) A contracting authority **may** publish on Contracts Finder information about a contract award opportunity even if the contracting authority does not advertise the opportunity in any other way.

(5) For the purposes of this regulation—

(a) a contracting authority advertises an opportunity if it does anything to put the opportunity in the public domain or bring the opportunity to the attention of economic operators generally or to any class or description of economic operators which is potentially open-ended, with a view to receiving responses from economic operators who wish to be considered for the award of the contract; and

(b) accordingly, a contracting authority does not advertise an opportunity where it makes the opportunity available only to a number of particular economic operators who have been selected for that purpose (whether ad hoc or by virtue of their membership of some closed category such as a framework agreement), regardless of how it draws the opportunity to the attention of those economic operators.

The word being may, not must.

While researching this for you, I came across an interesting article as mentioned in our phone call earlier today, which can be found [here](#) if you are interested.

I trust this helps, Amy

Amy Taylor
Member Services Officer



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Disclaimer: Any advice that we provide is in answer to the questions asked and based on the information provided to us at the time. We make our best efforts to ensure that our advice is accurate. If, however, the information is incomplete and subsequently you provide information, then the advice previously given may change.

From: Ventnor Town Clerk <townclerk@ventnortc.org>

Sent: 30 June 2020 20:19

To: Advice - Hampshire ALC <advice@Hampshirealc.org.uk>

Cc: Alison Killick <alison@ventnortowncouncil.org.uk>

Subject: procurement advice please

Hello

Ventnor Town Council is currently updating its Procurement Policy to comply with the NALC LTN 87 of May this year and the underlying 2015 regulations.

In our only previous large contract for works, in 2013, we used a selected list of 4 companies being Island-based and known to be equipped for the works.

The emphasis of the NALC LT, and the 2015 Regulations is on use of the Contracts Finder website for contracts in excess of £25,000 and below the EU thresholds.

But it appears to indicate that this requirement is only mandatory 'when it advertises the contract opportunity elsewhere.' [para 11].

That same apparent exception is also reflected in NALC's latest Model Standing Orders which state that in respect of a contract in excess of £25,000 the Regulations include a 'requirement on the Council to advertise the contract opportunity on the Contracts Finder website regardless of what other means it uses to advertise the opportunity unless it proposes to use an existing list of approved suppliers (framework agreement).'

So my request for advice is whether, in the context of the above, it is still acceptable for us to use the procedure we adopted for the 2013 contract in the contract we are currently developing to build a new public toilet at an anticipated cost of £150k inviting the same contractors to tender?

If more information is needed to respond to this request, I'm available anytime on 07720 771114.

Contracting authorities should ignore incorrect PPN guidance that all contracts valued over £25,000 should be advertised in Contracts Finder

Monday 8 August 2016

Crown Commercial Service (“CCS”) Public Procurement Action Note (“PPN”) 07/16 says that:

"Contracting authorities must ensure that any procurement opportunities and contract awards above certain low value thresholds are published on Contracts Finder."

As regards contract awards, this is entirely correct. However, it is dangerously misleading in suggesting there is a requirement to advertise all contracts valued over £25,000 (or £10,000 for central government).

The obligation to advertise prospective contracts on Contracts Finder is set out in Regulation 110 of the Public Contracts Regulations 2015. This obligation applies only, *"where a contracting authority advertises a contract award opportunity"*. It does not apply where there is no “public advertisement” of the contract opportunity, such as where a contracting authority approaches a single contractor (for example, the incumbent to extend an existing contract for a short period to cover a delayed procurement), or a “closed list” of contractors invited to tender by the contracting authority.

This is made clear in Regulation 110(5)(b) which states clearly that a contracting authority

"does not advertise an opportunity where it makes the opportunity available only to a number of particular contractors selected for that purpose".

Surprisingly, there is no mention of this Regulation in the PPN.

There are only two circumstances in which a contracting authority is required to advertise a contract valued below the EU tendering threshold publicly:

- where the contract may be of “cross border” interest to contractors based in other EU member states (which is often relevant for supplies contracts or for contracting authorities based in Northern Ireland, but not usually for contracting authorities seeking contractors or service providers within mainland Britain); or
- where the project is being funded by grant (particularly European Structural Investment Funding such as ERDF or ESF) and the grant conditions require public advertising.

Outside of these two circumstances, there is nothing in the Regulations that requires contracting authorities to advertise “below threshold” tender opportunities publicly.

Of course, a public advertisement may be required by a contracting authority's own standing orders, although these can usually be waived. It may also be helpful to demonstrate "value for money" or "best value", although this can also be done through benchmarking.

If a contracting authority chooses to advertise the contract publicly, even where there is no legal requirement to do so, it does need to be advertised also on Contracts Finder. The PPN is correct on this. The issue is where a contracting authority chooses not to advertise because there is no legal obligation to do so.

We have taken up this issue with the Crown Commercial Service and suggested that a correction is made to the PPN to refer to Regulation 110(5)(b). Our query has been referred to their "Policy Unit".

The willingness (or otherwise) of CCS to issue a correction to the PPN should tell us whether the omission is merely an oversight or a deliberate attempt to mislead contracting authorities into advertising on Contracts Finder contracts that do not need to be advertised at all.

For more information

Please contact [Andrew Millross](#).

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