



Leicester
City Council

FORWARD TIMETABLE OF CONSULTATION AND MEETINGS:

Cabinet

15th February 2010

PROCUREMENT: THE OPPORTUNITY FOR LOCAL SMALL/MEDIUM BUSINESS

Report of the Service Director Legal Services

1. Purpose of Report

This report is an overview of the various considerations and steps that can be brought to bear to assist the local economy in procurement activity. It is intended to be a starting point for more detailed consideration/development.

Section 3 of the report looks at the specific context of the current recession. Sections 4 to 6 outline various steps and considerations that are relevant to opportunities for local small/medium business in the context of effective delivery and the needs of the community, developing the market to improve outcomes and added value and the use of resources. Section 7 is a summary of the legal position.

In this report “SME” refers both to small and medium enterprises but includes social enterprises, community and voluntary organizations, BME’s, disability organizations and women’s organizations. Very small enterprises (less than 10 employees) are sometimes referred to as “micro”.

2. Recommendation

That this report be noted, and the direction of travel endorsed. In particular officers to work up guidance and support packages for SME’s, particularly with a view to reducing barriers to doing business with the Council, and to consider the approach to social issues in procurement.

3. BACKGROUND: RESPONSE TO THE RECESSION

This section considers the possible levers that can be brought into play in a procurement and business context to mitigate the effects of the recession.

Impact Assessment

- **early market engagement**

This will not only help to assist in the assessment of the effect of the recession, so that action can be focused where it is necessary but can benefit both the Authority and potential suppliers by aligning procurement to market and understanding the capacity needed/available. Early market engagement – including the SME/voluntary sector – usually takes one of three forms – regular provider meetings; “soft” market testing or “warming up the market”.

Developing the Right Skills

- **help with procurement**

This will promote an understanding of procurement practices. National surveys have shown that the process of procurement (and commissioning) can be a barrier for small locally based organizations. Advice and training, for example about how a local authority buys, how to compete for tenders, how to “win” grants and environmental considerations is a sustainable way of building capacity and reducing wastages of time.

Supporting Moves Away from Services to Innovation

- **calling for innovative solutions**

This would generally be done by “warming up” the market to the Authority’s needs or seeking a contract for the development of a solution rather than the final “specification” itself.

- **Environmentally Sustainable procurement**

There is considerable scope for environmental issues and outcomes to be taken into account throughout the procurement process. This clearly can be support “sustainable communities” through saving the use of resources, protecting the Environment, sustainable economic and employment growth and social outcomes. Environmental issues can be addressed through the contract specification, contract management conditions and, in procurement through selection criteria and evaluation criteria (in proportionate terms to the relevance to the particular contract).

Help for Vulnerable Businesses

- **grants and loans**

This “lever” stands outside the procurement process but would be relevant in this context to build skills through training or start up, or to support businesses having difficulty in raising loans.

- **contractors in distress**

This is relevant where a contractor is in contract but is in difficulty and steps can be taken to save the contract.

Role of Advice Services

This issue relates to the capacity of the advice service market to respond to increasing issues of debt management, insolvency as well as advice in technical terms as to accessing contracting or funding opportunities.

Safeguarding the Local Supply Market

There are a range of actions open to a local authority – these are considered further below.

4. EFFECTIVE PROCUREMENT AND THE NEEDS OF THE COMMUNITY

Encouraging SMEs

SMEs have short management chains and approval routes, so should respond quickly to changing requirements. SMEs may also be highly focused on particular markets making them particularly responsive to changes in those markets. The SME may also be more willing and able to tailor a product or service to meet specific needs than a larger firm that sells an established offering.

Many SMEs, including social enterprises, VCOs, BMEs, DPs and WOs supply high quality specialist products services than larger suppliers, either because larger suppliers are discouraged by the limited demand, or because the SME has particular skills, originality and commitment in that field that are unusual.

The following steps can be appropriate:-

- Consider “package” size of contracts
- Advertise opportunity where SME’s can more easily find out about opportunities

Example 1

In Leicester the Council were looking for a provider to work with and support a particular minority. It was essential that the provider had knowledge of Leicester’s diverse communities. There is a strong VCS in Leicester, especially small organizations, working with our communities and the Council wanted to make sure this opportunity reached this market. The contract value was low. As well as advertising the opportunity on the Council’s website the Council then uses existing community networks to advertise the opportunity

- Hold “meet the buyer” events
- Increase awareness of possibility of “consortia” bids

- Emphasis on quality and delivery evaluation criteria
- Providing for interim or milestone payments (to help with cash flow) or even for start up costs
- Encourage main contractors to adopt good supply chain management – even if an SME cannot bit itself it may be part of the contractual supply chain – this can also extend to “fair payment” clauses or agreements which protect payments to sub contractors
- Helpful feedback on bids
- Establish training courses and workshops to help SMEs improve competitive skills in completing tender documentation
- Include consideration of SME/VCS suppliers in the “market assessment” stage

Example 2

In Leicester workshops have been held for the local VCS through the Council, acting in partnership with Voluntary Action Leicester. The aims of these sessions were to give practical advice and support, and tips on completing and meeting the minimum standards of the Pre Qualification Questionnaire. Representatives from the Council’s Equalities, finance , risk management, health and safety and environment teams gave out information and sample policies were provided as a guide to enable organizations to develop their own.

Promoting Skills and Regeneration

This is part of Government Policy to promote skills development, training and apprenticeships.

This can be achieved – of course where relevant to the subject matter of the contract by:-

- Requiring contractors to have a formal training plan to develop their workforce
- Require a specific proportion of contractors workforce to be apprentices or in receipt of training skills
- Requiring a specific proportion of the hours worked to be by apprentices or persons in receipt of skills training
- Where “partnering” is used to develop partnership objectives in education, training, apprenticeships and employment to be realized through a procurement strategy
- Identifying training requirements for SMEs and communicating these early in the process to bidders

- Ensuring contractor staff have basic skills for example to understand health and safety procedures
- Requiring particular qualifications (for example electricians) and CPD as part of the specification
- Requiring a method statement as to how bidders would support the Authority's targeted recruitment and training initiative through the supply chain.

Example 3

A government department has a contract clause in their prime contracts requesting the contractor to advertise their subcontract opportunities. They facilitate this process by allowing the contractor to advertise such sub contracts in the departmental bulletin and on the departments website at no cost.

4. Developing the Market to Improve Outcomes

“Local Labour Clauses”

This relates to employment and training opportunities for unemployed and young people, and are particularly relevant when large construction projects are undertaken or large service contracts are let.

The phrase as such is a danger zone as explained below but it is in common parlance.

Reducing unemployment, helping those with particular difficulty in achieving integration, on site vocational training (in particular through apprenticeships and the development of the skills of young people, for example, are possible to address through procurement and contracting, although the justification and VFM analysis needs care.

Reference has been made above to the principle of non-discrimination. This means that it is not possible to give *preference* to local firms or require suppliers or their workers to be local. Local firms may however, find that they have strengths and advantages in meeting the Authorities requirements. For example, a security alarm contract would require a very short response time.

Post contract award voluntary protocols do not present the same problem.

Example 4

A prime contractor for a West Midlands hospital project has developed a code of practice for the conduct of industrial relations to assist in the process of working together with trade sub contractors and the appropriate trade unions to promote the successful completion of the works. This includes an understanding the basis how sub contractors source their labour, the participation of trade contractors in training and employment initiatives, and working rules for operatives of trade sub contractors.

Example 5

An ALMO in the Midlands has developed a training scheme to help provide an avenue for local trainees into the construction industry thus increasing the skills base within the local communities it is working in. training is delivered on site and in day release by various local colleagues. The ALMO and its construction partners have developed a framework to offer sustainable training. A key element of the framework is a partnership with local colleges and Connexions for the recruitment of apprentices and the delivery of training programmes.

Social Issues in Procurement

This phrase generally refers to how issues such as community benefits, gender equality, disability equality, race equality, labour standards, training and employment issues, workforce skills, sourcing of materials and encouragement for SMEs can be incorporated into the contract specification, contract management conditions and the selection and evaluation of bidders.

Great care needs to be taken from the outset to ensure that such provisions or requirements are relevant to the subject matter of the contract or the service users. Equally important is to make it clear to bidders from the very start of the procurement how these issues will be taken into consideration.

Some examples of how social issues can be taken into account:-

- Relevant staff skills and training (“or equivalent”) can be specified and assessed – this can include – where relevant – sub contractor staff
- A suppliers ability to perform the contract can be taken into account so if the contract has “social” outcomes this would be relevant
- Particular options could be “welcomed” but not assessed, if the successful contractor offered this option then the contract can make it clear that that option is made available
- Bidders can be asked to come up with solutions for involving “hard to reach” service users
- Bidders can be eliminated if they have convictions under national laws relating to workforce conditions (providing such law is EU law compliant) for example, equality laws
- Additional benefits can be taken into account in award criteria provided that it is explained how these will be scored

- With care to avoid them being seen as discriminatory against bidders from other EU states targeted recruitment and training conditions can be included, for example, to benefit job seekers and young persons seeking apprenticeships
- Relevant characteristics of a product can be specified for example, “sustainable timber” – characteristics that do not relate to the product, but for example, the quality of life of the growers are more difficult

Training and Development Grants, Loans and Business Investment

The Authority would in most cases be able to provide these using well being powers. The Authority may in limited cases be able to invest directly (for example by buying shares).

Grants, loans and the like (but not financial investments) are most likely to be “subsidy” and count as “state aid” – therefore need to be compatible with EU treaty and have to be notified. There is however, a considerable regime of exceptions and block approvals – temporarily enhanced because of the recession.

Care would be needed to frame and time any subsidy so that the procurement process would be liable to challenge on the grounds of discrimination. This would normally be achieved by keeping the procurement process whole and transparent or perhaps even including the opportunity of subsidy as part of the competitive package.

5. Added Value and the Use of Resources

Advertising opportunities

The Government has developed a website: <http://www.supply2.gov.uk/> - where below threshold procurements can be advertised. This acts as a central and simple way for businesses to find out about opportunities. The Council also maintains current contracting opportunities on its website and has the facility of advertising on line at SOURCE LEICESTERSHIRE and SOURCE EAST MIDLANDS

For “OJEU” procurements local advertising is of course permitted as long as it does not pre date or supplement the OJEU notice.

Simplifying Procurement

The administrative burden of responding to calls for interest is borne by the contractor and this can be significant for small firms. However there are certain legal reasons why the Authority asks questions – to ensure that the bidder does not trigger one of the mandatory grounds for exclusion, to ensure that contractors are legally, financially and technically able to carry out the contract, and to be able to demonstrate fairness and transparency.

The following can be considered:-

- e-procurement can reduce costs and time but can exclude competitors who are not comfortable with the technology or process involved – however procurement of

particular packages where more “high tech” suppliers would be interested may be made easier by e procurement

- simplified PQQ – possibly a two tier structure to accommodate non complex, straight forward risk allocation contracts
- avoid asking for too much, or disproportionate, information during procurement
- supporting capacity building either through funding sources of advice or subsidy for capacity building
- on line work books etc
- national accreditation schemes (basically a “passport” through PQQ) are problematic for small business as they are relatively expensive to register for (with no guarantee of business) and are generally out of date.”
- hold “meet the buyer” events

Example 6

EMPA (of which this Council is a partner) is procuring a regional framework for construction works of value £10k to “2m. As part of this a series of meet the buyer events are planned, one of which was on 27th January at the Walkers Stadium. The partners have been very conscious and keen that the Framework Contractors use local supply chain contractors and labour in undertaking the works. To aid this, performance indicators have been included within the performance monitoring of the Framework Contractors to demonstrate the level of local labour/suppliers and contractors they are using in procuring these works.

- allow sufficient time for procurement, this will mitigate against abortive procurements (with disproportionate cost effect on small businesses), and allow time for those unfamiliar with bidding to ask for and receive clarifications

The Council already has on line information about selling (goods, works and services) to the Council at :

<http://www.leicester.gov.uk/business/selling-to-leicester-city-council/>

Smaller Packages

Aggregating (“bundling”) the Authority’s requirements into large packages may well bring savings, reduction in procurement and management costs, bring consistent management information and “buying power” but it can also reduce the number of suppliers able to compete, exclude small firms, lead to “one size fits all” services and reduce the number of innovative suppliers.

Case by case consideration of, amongst other things, the following factors is relevant:-

- the Authority's own capacity to manage and monitor the procurement and in contract phases of contracts
- what similar things is the Authority buying and at what price?
- would larger (or smaller) bundles change the market or the price – are there, for example, significant economies of scale to be had or is the degree of investment involved only something which a large company can source?
- what are the dangers of anti-competitive situations by reducing competition to a few “usual suspects”
- if Authority is looking for innovation is this something that can be achieved locally or by niche firms; or only by large companies?
- if there are geographical requirements, high level service requirements or response time requirements is local sourcing the better option?
- risk transfer or risk distribution?
- if a larger contract is sought can the Authority can the involvement of local business at sub contractor level be promoted for example, through benchmarking, sub contracting protocols (probably not legally binding), “local labour” provisions or through specifying local economy outcomes

Example 7

Seven social landlords and two local authorities in the Merseyside area set up a social enterprise for housing projects. A social enterprise is like a company, although its purpose is to put back surplus profits into the community. The procurement model creates training and employment opportunities for local people from strategic procurement savings and volume efficiencies. These opportunities are made available through the contractual conditions that the supply chain adheres to. One per cent of the total contract value is contributed by the social enterprise.

Financial and Insurance criteria

This factor can be summarised as the risk of contracting. Small enterprises may be deterred from bidding, or indeed may be eliminated from bidding processes because they do not meet the financial and insurance criteria. On the other hand the Authority has to secure value for money and may be under a duty to ensure service delivery.

This is a difficult area but a risk assessment/equivalent measures approach could be used for smaller, less complex procurements.

Contract Management

Contract management and working with contractors can help to spot signs of contractor distress and potentially keep the contract and the associated supply chain contracts alive of that is the best course of action

It can also assess whether there are any shortcomings in workforce skills or whether particular conditions, say, as to the use of apprentices have been observed, so that these can be followed up

There are steps that the Authority could take to help cash flow situations, for example prompter payment, (some subcontractors, for example, may be on a “pay when paid” regime), advance payments, rescheduling of milestones, early discussions about possible contract variations or waivers of contractual rights (for example giving the contractor “time”) and, for subcontractors, “fair payment clauses.

Example 8

A grouping of Councils in Oxfordshire have set up a collaborative procurement hub. As part of their workplan they have signed up to the Government’s “Prompt Payment Code” This aims to tackle the crucial issue of late payments and in particular help small businesses. The aid behind the prompt payment discounts project was to support suppliers with their cash flows and support economic development in difficult times, at the same time discussing what additional savings suppliers might provide to the Council. 3,201 lines of suppliers were identified. Quick wins over 8 weeks amounted to £31,600 new savings per annum.

Issues of service delivery risk, value for money, ownership of materials and contractual and sub contractual remedies would have to be considered as well as the inevitability of the contract falling.

6. Legal Implications

The following legal threads run through this report at all times:-

The Council has “well being” powers to do things that will promote the social, environmental and economic well being of its area or its inhabitants (or part or some) This can extend to the making of grants and the giving of guarantees

- The Council has “Best Value” duties of effectiveness, economy and efficiency.
- Under the Local Government Act 1988 the Council cannot have regard to certain “non commercial” considerations in the award of contracts. This does not apply to the “6 race equality questions” as set out in the act or to cases where the questions are required for “Best Value” reasons.
- All procurement is subject to EU regulation and the requirement for “fairness and transparency” Only contract awards over certain thresholds are however subject to full EU procurement regime.
- EU procurement rules, based on principles of non-discrimination, transparency and competitive procurement, must be applied appropriately to all public procurement activity. In seeking to enhance the local economy, it is important to ensure that

particular suppliers are not given an unfair advantage in any subsequent procurement.

- Contracts can be awarded on “price alone” criteria or “most economically advantageous” criteria. The latter would be required to implement the procurement implications outlined in this report.

7. Other Implications

OTHER IMPLICATIONS	YES/NO	Paragraph Within Supporting information	References
Equal Opportunities	Yes	Through Report	
Policy	Yes	Whole Report	
Sustainable and Environmental	Yes	Through report	
Crime and Disorder	No		
Human Rights Act	No		
Elderly/People on Low Income	Yes	Through report	

8. Background Papers

Research file held by author

9. Consultations

Strategic Commissioning Project Board

10. Report Author

Joanna Bunting
Head of Commercial and Property Law
Extension 29 6450

Key Decision	No
Reason	N/A
Appeared in Forward Plan	N/A
Executive or Council Decision	Executive (Cabinet)