

Legal Note from City Barrister on Member involvement in procurement exercises.

At what stage(s) of a procurement exercise may Elected Members become involved?

1. **At the design stage** of a procurement to check/guide the relevant Division's plans for how a matter will be procured. This would be at quite a high level, in terms of the *type of process* and *broad evaluation criteria*. Any involvement in the exact wording of questions/documentation and scoring etc. would be considered "operational detail" which should be left to officers to undertake. In summary, the role of Members is, in this regard, to check/steer what "process" will be followed (though this will largely be dictated by the Law and by our Contract Procedure Rules) and what is sought by way of commenting upon the "evaluation criteria" to be applied (in broad terms).
2. **At the post-award stage** the role of Members might be to check that the systems/processes/rules were properly applied. Any scrutiny should focus on whether the process complied with the Council's Constitution and the law, and at a broad level to assess whether the exercise met the objectives for which it was designed. Detailed review of the scoring of individual questions for individual tenderers would be inappropriate (see below advice on the scope of a Member's access to paperwork based on the Political Conventions and the "need to know"). It is not for Scrutiny to review actual bids or the actual scoring that was applied. They are not the lawfully convened evaluation Panel and therefore any attempt to "second guess" the evaluation would render the whole exercise vulnerable to challenge because even if they do not mean to influence the outcome of the proper Panel, any commentary by Members (after involvement in operational detail) would convey an impression of undue influence given the officer-Member relationship. They can review the process at a reasonably high level and ensure compliance with the law.

Note also that what is being described above is a "post-award" stage, not a "post-evaluation" stage. It is not proposed that Members should expect that they are entitled to a right to scrutinise a procurement exercise in-between "evaluation" and "award". Any involvement at this stage can only be in accordance with "call-in" procedures and I would expect this to apply by exception only.

Why can't Elected Members become involved in scrutinising bids during the phase of a procurement exercise when received bids are being evaluated, and before a preferred bidder is selected?

The reason for this is because the Council must legally abide by numerous laws (as well as its own commissioning procedures) which govern how fairness and transparency is to be achieved in the award of contracts. The commissioning process requires very clear and unambiguous criteria to be published identifying what the Council is looking for in a successful bid, and precisely how all bids will be evaluated. There can be no surprises and no influence of how bids are scored other than by reference to the published criteria. Therefore, to reveal information to Members about bids received during the crucial evaluation phase exposes the whole process to risk. For Members to seek to express views (positive or negative) about any bids during this phase would undermine the process of fair evaluation.

Indeed the mere fact of disclosing information about bids to Members (even if they expressed no view) would expose the procurement exercise to challenge because this would stand as evidence that the published procedure had been varied. The process would be tainted regardless of whether actual influence had been levied

It is also right to say that the Council gives assurances of confidentiality during such procurement exercises, and to reveal information to Members would breach that legally binding assurance. Doubts about the quality or integrity of bids are for officers to evaluate according to published criteria. There is no compulsion to select a preferred bidder, or to go on to award a contract therefore officers do have some room to 'test' bids and negotiate some of the nuances. The involvement of Members at this stage would seriously undermine the process, and expose the Council to costs, legal challenge, damages and reputational harm.

What rights do Members have to see 'bid' documentation?

There is, in the Political Conventions (see in particular pages 249 – 251 of the reproduced text attached), an assumption of a Member's "*need to know*"

However that "*need to know*" is not taken for granted where a "*restriction*" applies

A "*restriction*" often applies in procurement exercises because we give an express assurance to bidders to maintain confidentiality and not use their bids for anything other than the formal evaluation of the bid by the body of persons charged with that task of evaluation (and/or compliance with FOIA etc)

Also/alternatively much the information submitted by bidders will be commercially sensitive (costings/pricings/financial viability etc).

Therefore we are covered by a “restriction” and so a Member should be asked to state why they have a “need to know” the information sought

If such a need is asserted, those reasons would have to be compelling enough to overcome the “*restriction*”. Councillors have no power to change the outcome. It is therefore difficult to see why a Member would need this documentation. The Contract Procedure Rules are clear about how evaluations are conducted, and Members do not make up the evaluation Panel.

As for Scrutiny, its purpose is not to scrutinise operational cases/exercises (save for the power to call-in particular Executive Decisions). It is for the law (i.e. through unhappy bidders raising a legal challenge) that procurement exercises can be challenged. Even if Scrutiny successfully argued that there was some legitimate broader public interest in conducting some kind of “lessons learned” exercise in respect of a procurement exercise, it would be a different thing entirely for such a post-mortem to include scrutiny of actual bids, and comparison between them. This is delving deep into operational casework

BRIEFINGS

A Member's right of access is restricted where:

- The information is primarily needed for a non-Council purpose; or
- There is a conflict of interest; or
- Where a report is exempt or confidential by law
- There is an over-riding individual right of confidentiality (for example, in a children's safeguarding or employment matter); or
- The resources needed to supply the information would be unreasonable.

Executive Members, individually and collectively are entitled to regular confidential briefing on matters relevant to their portfolios and in support of the policies they are developing prior to them formulating formal proposals. The relevant Executive Member or the Executive collectively determines whether confidential briefing material may be released to others for consultation or otherwise. When formal proposals are made supporting Officer advice becomes publishable in conjunction with the proposals.

Other specific roles where members will have a special need to know arising from that role include:

- Chair and Vice-Chair: matters relating to their terms of reference and committee business;
- Scrutiny Committee or Commission members: matters directly relating to a review currently in process
- Ward Member: matters with special implications for the Ward (ie significantly more than the general implications for the City).

A Scrutiny Chair or Vice-Chair is not normally entitled to information in that capacity without it being known to and available to the other.

An Officer should seek clearance from his or her manager before embarking on a significant amount of work to provide information. The officer should be clear about the capacity in which the Member is being briefed and the implications of any interest. In cases of doubt, the Monitoring Officer may be consulted. The Officer should always make it clear if a briefing is not based on unified advice, (i.e. is still subject to consultation with other Officers). Otherwise the Member is entitled to assume unified advice is being given. Officers should note that any

briefings may be disclosable.

Partial or restricted briefings may be given to Members where necessary in the interests of data protection or other considerations.

If officers refuse a request the Member should approach the Relevant Divisional Director and If still dissatisfied the Monitoring Officer may be asked to determine entitlement.

It should also be noted that any unauthorised release of confidential information may damage the Council's reputation or entail a breach of the law.

For all formal briefings to groups and non-grouped Members the following conditions must be applied:

- The Chief Operating Officer knows of and approves the briefing;
- All Groups are informed and offered the same briefing;
- More than one Officer attends;
- Officers withdraw after briefing and any questions, and before political discussion;
- Officers do not write reports for Groups, leaving it for City Mayor / Councillors to present draft Committee reports or briefing notes.

Where a briefing is provided to a Group, 'non-grouped' Members will be offered a written summary, and where appropriate a verbal briefing may be offered. If offered a written summary the non-grouped Member may request that they receive a verbal briefing instead and if necessary refer the request to the Monitoring Officer.

MEMBER INVOLVEMENT IN CASEWORK

A Members role in relation to casework is:

- To be briefed or consulted where there is a need to know;
- To pursue the interests of individuals by seeking information, testing action taken and asking for the appropriateness of decisions to be reconsidered.
- The Member should avoid becoming unduly involved in individual cases and operational detail, except within clear procedures.

Involvement in legal proceedings and audit investigations carries special dangers of prejudicing the case, and of personal embarrassment. The District Auditor has warned of the dangers of individual Members intervening in the processes of the Council without full knowledge of the facts. Access to files may need to be denied or restricted if one of the restrictions detailed above applies. Any access then allowed may need to be “*managed access*”.

Officers should take the lead in pointing out where the boundaries lie in particular areas, recognising that:

- Members legitimately adopt different approaches to case resolution
- The special local knowledge of particular Members may be useful to a particular case.

Officers should point out to the Member when a restriction on the ‘need to know’ may apply, explore entitlement with the Member and, in cases of doubt, consult the Monitoring Officer.

Directors should ensure that their staff know how to obtain appropriate senior management support (particularly out of hours) when the extent of a Members involvement in an issue needs to be clarified.

Officers should not seek to involve Members in operational detail.

A Member pursuing a Ward matter on behalf of a close family member or friend should declare the relationship and consider whether to ask another Member to pursue the matter.