

Item No. 15.	Classification: Open	Date: 7 June 2016	Meeting Name: Cabinet
Report title:		Fairer Future Procurement Strategy for Southwark Council	
Ward(s) or groups affected:		All	
Cabinet Member:		Councillor Fiona Colley, Finance, Modernisation and Performance	

FOREWORD – COUNCILLOR FIONA COLLEY, CABINET MEMBER FOR FINANCE, MODERNISATION AND PERFORMANCE

Our council's vision is to create a fairer future for all in Southwark. We have promised to deliver value for money, high quality services in our borough and naturally this is central to our strategy for procurement of supplies, services and works. However, we believe there is an opportunity for our procurement and contracts to deliver so much more than this.

This strategy sets out how we will use procurement to promote enhanced employment rights, to ensure fair pay and terms and conditions, to reduce inequality and to encourage ethical corporate behaviour. It continues our commitment for all contractors to pay the London Living Wage and introduces a new requirement asking that they sign up to the Southwark Diversity Standard, that covers key issues such as offering guaranteed hours contracts. It makes clear that companies that engage in illegal blacklisting of union members and activists can expect to have their contracts terminated.

The strategy also ensures that key strategic contracts have early and timely political input when assessing options and before a decision is taken about the external procurement of the services. Gateway zero decisions will include challenging whether services should be procured externally at all or if we could achieve better outcomes with an in-house service as we have done with our in-sourcing of customer services and the revenue and benefit service.

Our contracts also present an opportunity for added social value, when our contractors are able to provide additional benefits, at little or no additional cost. Whilst we are flexible and open to bidder's proposals of what added value they can offer, we are of course particularly seeking social value offers that help us to achieve our fairer future promises and commitments such as local employment and apprenticeship opportunities. In the coming months we will be piloting a new tool that we hope will assist us in assessing the value of these proposals in relation to our fairer future priorities and to better monitor the delivery of social value within contracts.

I'd like to thank all the members of overview and scrutiny committee whose 2015 report was the genesis of this Strategy and many of the new commitments within it. I hope that it will live up to their ambitions and help deliver our shared ambition of a Fairer Future for All in Southwark.

RECOMMENDATIONS

1. That cabinet approve the Fairer Future Procurement Strategy. This replaces the Contracts and Procurement Strategy in the Medium Term Resources Strategy.
2. That cabinet approve the introduction of a strategic assessment (gateway zero) into the procurement governance process for service contracts over £10m.
3. That cabinet note the next steps for enhancing our commitment and approach to social value in procurement as outlined in paragraphs 23 to 32.
4. That cabinet endorse the additional actions to combat the practice of 'blacklisting' as detailed in paragraphs 33 to 42.
5. That cabinet note there will be consequential amendments to the constitution, including the contract standing orders, following the approval of the Fairer Future Procurement Strategy to reflect updates required as highlighted in the report.

BACKGROUND INFORMATION

6. The overview and scrutiny committee undertook a review of commissioning and procurement at Southwark. The recommendations of the review were presented to cabinet on 10 February 2015.
7. A response to the recommendations was given at cabinet on 21 July 2015 with an undertaking to develop a Fairer Future Procurement Strategy.
8. This report therefore provides a proposed Fairer Future Procurement Strategy (FFPS) to be approved by cabinet.
9. The Overview and Scrutiny committee on 10 March 2016 discussed the question of how the council's procurement process addresses relationships between companies within a group and suggested that this be taken into account in the cabinet's consideration of the council assembly motion of 26 January 2016 on blacklisting.
10. Cabinet on 15 March 2016 agreed that officers consider the policy implications of the motion and recommendation from the overview and scrutiny committee and bring a report back to cabinet.

KEY ISSUES FOR CONSIDERATION

11. It is essential that the council undertakes procurements fairly and well, as good procurement practice is central to achieving the council's fairer future promises. Good procurement has the potential to deliver key community impacts by encouraging local small and medium sized businesses, and by enhancing the social value the council gains from its spending.
12. Promise 1: Value for Money. The council will continue to keep council tax low by delivering value for money across our high quality services. The link from this promise to the council's Fairer Future Procurement Strategy is clear.

13. Good procurement will be central to achieving many of the other fairer future promises, as they will require capital works or other service procurement. These include:
 - Promise 2: Health for all
 - Promise 3: Quality affordable homes
 - Promise 4: more and better schools
 - Promise 5: Nurseries and childcare
 - Promise 7: Safer communities
 - Promise 9: Revitalised Neighbourhoods.
14. Good procurement is also central to achieving our Fairer Future values. Treating residents as if they were a valued member of our own family, means ensuring that services provided are fit for purpose and meet needs now and in the future.
15. Being open, honest and accountable is a key requirement when we are spending public money, and when we are working to encourage new suppliers. We must be able to demonstrate that our procurement practice makes it easy for others, including the voluntary and community sector to engage with us.
16. Spending money as if it were from our own pocket: this requires a rigorous analysis of whether we need to spend at all, along with careful specifications to ensure we are buying in a cost effective manner.
17. Making Southwark a place to be proud of is also about leveraging our position to getting the most from our spending with external organisations through contracts. This can include seeking to package work so that it is achievable for local small and medium sized enterprises, as well as gaining social value from our procurements.

Spending money as it if were coming from our own pocket

18. The Procurement Strategy sets out the importance of achieving value for money for all spend that the council has with external providers, in the way in which contracts are both let and managed.

Being open honest and accountable

19. The use of public funds for contracts is subject to appropriate scrutiny, to ensure that this has been done fairly and in compliance with the council's contract standing orders, transparency obligations and wider legislation including the Public Contract Regulations 2015. The FFPS addresses the need to incorporate the council's values and aims, when it considers the route to delivery for services, supplies and works, and how to maximise opportunities to support its aims when it enters into contracts with external suppliers.
20. Cabinet are asked to approve the recommended introduction of a "gateway zero: strategic assessment" process which explores the options and makes the case for the preferred mode of delivery, for example, in-house, private sector, VCS sector or shared service. If to be procured externally, the strategic assessment will also consider the broad methods by which a service is to be delivered, such as single provider or framework of providers.

21. Gateway zero: strategic assessments would be required for all services contracts that are over £10m in value (excluding all capital works). The relevant cabinet member may also request a gateway zero strategic assessment for a project that falls below this value, or is for goods or works, but which holds strategic importance to the council.
22. The gateway zero: strategic assessment should set out how the delivery or commissioning decision will address social value causes such as London Living Wage, apprenticeships, local employment, equality considerations and environmental impacts.

Making Southwark a place to be proud of

23. The council has a commitment to getting the most of its spend with external organisations through contracts. The additional value that benefits the local area, economy and residents is termed social value.
24. The council wishes to work with current suppliers, as well as potential suppliers, to explore opportunities for bringing benefits to the local community, environment and economy.
25. The FFPS confirms the council's current practice that all gateway one reports for all tenders should consider the possible social value and additional benefits that could be delivered as part of the delivery of the contract. This is beyond the council's legal obligation under the Public Services (Social Value) Act 2012 to consider what social value could be obtained during a procurement process for all service contracts (including social and other specific services) that are subject to the Public Contract Regulations 2015.
26. Social value must be linked to the delivery of benefits to Southwark and specifically to deliver the council's Fairer Future promises and policy commitments and targets. These include:
 - London Living Wage
 - Job creation
 - Apprenticeships and work placement opportunities
 - Environmental and sustainability considerations
 - Requiring suppliers to comply with the council's Safer Lorries, Safer Cycling Pledge including the Fleet Operator's Recognition Scheme at Gold standard where appropriate.
27. All gateway two reports that set out the contract award recommendation must set out the social value that has been committed as part of the tender process. Contract managers will be responsible for the on-going management, measurement and reporting of the delivery of the social value commitments as part of contract management.
28. A social issue may be an award criterion if it is linked to the subject matter of the contract. Where it is, the council can take into consideration social benefits at every stage of the procurement, including at selection (in terms of the bidder's experience) and at award (in terms of the bidder's proposals to deliver social benefits). In nearly all circumstances it will be possible to seek to secure additional social benefits.

29. The evaluation criteria for social benefits must be set out in any OJEU Notice. Wording used for this purpose should be framed as broadly as possible to ensure maximum flexibility throughout the process. The following is example wording:

"It is intended that this Project acts as a catalyst for [broadly define the goal of the social benefits e.g. regeneration within the London Borough of Southwark]. Accordingly, the [contractor] will be required to actively participate in achieving these objectives and contract performance conditions may relate to social and environmental considerations. The contractor's technical capability to meet these requirements may also be assessed at the pre-qualification stage and criteria which assess the manner in which the contractor will meet these requirements may also be included within the contract award criteria."

30. An open question may be drafted as follows:

"Bidders are required to demonstrate how they would construct and operate their supply chain(s) in order to respond to matters in the area of the specific Scheme, evidenced by specific examples. This should include as a minimum: Employment opportunities; Education / training / apprenticeship opportunities within the supply chain."

or

"The Contractor is required to state in Appendix # the number of small businesses (SMEs) and Social Enterprises (SEs) that it will employ on the Project. The Contractor will be required to make opportunities available and to support the development of an effective supply chain."

or

"The Contractor is required to develop and deliver a community benefits plan identifying the benefits which it will contract to deliver during the course of the contract. The plan should describe in detail each benefit, how and when it is to be delivered."

31. It is proposed that between 5 and 10% of the total marks available within the 'quality' part of any price/quality evaluation will be used for social value. Where this is not possible then lead contract officers will identify this in their gateway 1: procurement strategy reports.

32. Social value could bring long-term good to Southwark by:

- Creating skills and training opportunities
- Creating employment opportunities for the long-term unemployed or those not in education, employment or training (NEETs)
- Offering work placements to school children and young adults
- Providing career advice and information for young people on specific careers, such as construction, architecture or engineering
- Offering curriculum support to schools, with contractors sharing knowledge and expertise about their discipline
- Improving the health and wellbeing of Southwark residents
- Providing additional opportunities for individuals or groups facing greater social or economic barriers
- Creating supply chain opportunities for SMEs and social enterprises
- Creating opportunities to develop third sector organisations
- Encouraging community engagement
- Supporting initiatives like targeting hard to reach groups
- Encouraging ethical and fair trade purchasing.

Countering Blacklisting

33. The council is aware of the destructive practice of blacklisting that occurred for many years in the UK construction industry and the disastrous effects it had on many of the workers who were included on the blacklist, many of whom were apparently blacklisted for raising legitimate health and safety concerns with their employer.
34. The council already has a process in place for works contracts to identify any companies that have made use of the blacklist in the past to ensure that they have put in place actions to prevent such behaviour recurring and to compensate those victimised by the practice. This can be extended to other contracts as long as the approach is proportionate and relevant.
35. Cabinet were asked to consider a provision to include blacklisting in the prequalification questionnaire for new construction contracts.
36. The council cannot include a pre-qualification stage in any procurement valued under the EU threshold for services (currently £164,176). This means the council cannot have a separate stage during which it assesses the suitability of candidates to reduce the numbers who proceed to tender. However, the council can ask candidates suitability assessment questions as long as they are relevant to the subject-matter of the procurement and proportionate. Questions relating to the Blacklists Regulations may be particularly appropriate for construction related procurements.
37. For over-EU threshold procurements, the council is required to use a government standard Pre-Qualification Questionnaire which allows for limited amendments. It may be appropriate to include Blacklist Regulations questions within the technical section and advice should be sought from the contracts team in legal services. Example questions are shown in appendix 2.
38. Blacklisting can amount to an act of grave professional misconduct which renders the organisation's integrity questionable, and so could justify exclusion of a tenderer from a procurement. However, any exclusion must be:
 - Proportionate
 - Justified on the evidence
 - Considered on a case-by-case basis
 - Not a means of punishing operators for past wrong doing.
39. The council can also require "self cleaning" which enables a potential contractor to show that it has taken or will take measures to put right its earlier wrongdoing and to prevent them from re-occurring and to provide evidence that the measures taken by the potential contractor are sufficient to demonstrate its reliability.
40. For 'self cleaning' the contractor should prove that it has:
 - "Owned Up": clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities
 - "Cleaned Up": taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct, and
 - "Paid Up": paid or undertaken to pay compensation in respect of any damage caused.

41. The council must evaluate these measures taking into account the gravity and particular circumstances of the misconduct. If the council considers the evidence is sufficient the potential contractor shall not be excluded from the procurement procedure. If the council considers the measures are insufficient, we must give the economic operator a statement of the reasons for that decision.
42. In respect of a request to cabinet to consider making provision in the council's terms and conditions for public works for termination of the contract if a supplier is found to engage in blacklisting activities during the course of that contract – a sample clause to achieve this is shown below:

The Provider/Contractor shall (and shall procure that the Provider's Personnel/Contractor's Employees shall) comply with the requirements of the Employment Relations Act 1999 (Blacklists) Regulations 2010 ("the Blacklists Regulations) and shall ensure that it will not during the [Term/Contract Period/provision of the Works] be a party to or concur in any discriminatory employment practice which could be construed as blacklisting or boycotting any person who has sought employment with the Provider/Contractor in breach of the Blacklists Regulations.

The Employer may terminate this contract in the event that the Provider/Contractor commits an offence under the Employment Relations Act 1999 (Blacklists) Regulations 2010.

Constitution implications

43. If cabinet agrees the proposed FFPS, a number of changes to the council's constitution, including the contract standing orders would need to be made to reflect this.
44. These amendments cover:
 - the introduction of gateway zero strategic assessments and their approval by cabinet members
 - update to key decisions definition to reflect need for gateway zero strategic assessments to be included in the forward plan
 - explicit requirements to consider and report on the option for in-house services provision in all pre-tender gateway one reports
 - consideration and reporting on commitments for social value in the gateway reports for all procurements.
 - to reflect the requirements associated with the use of the eProcurement system
 - update to reflect the previously recommended member engagement "where the aggregate value of the contract or purchase is valued at £100,000 or more, the lead contract officer must consult with the relevant portfolio holder before the procurement strategy is implemented."

Policy implications

45. The Fairer Future Procurement Strategy reflects and provides support for how some of the council's policies will be implemented where they affect procurement and commissioning of contracts. These include supplier commitment to its Diversity Standard, payment of the London Living Wage where appropriate and targets around social value priorities such as

apprenticeships that form part of the Fairer Future commitments.

Community impact statement

46. This strategy sets out the consideration that the council will have in future procurement processes. In ensuring that as part of this process, the maximum possible benefit and impact of the procurement and resulting contract to benefit on local people and the community, the strategy aims to have a significant positive impact, assessed on a case by case basis for each procurement requirement.
47. The provisions within the FFPS, particularly around social value, are designed to encourage and support the integration and early consideration of factors through procurement activities that will provide benefits to local people and communities.
48. Encouraging suppliers to commit to the council's Diversity Standard will support this work and all will be required to comply with all equalities legislation.

Resource implications

49. The strategy sets out how procurement processes will integrate council policy and best practice and support the delivery of the council's Fairer Future commitments. It is intended to have a positive impact on improving the outcomes and delivery of value for money from spend with external providers.
50. The procurement advice team will continue to support in the development of procurement strategies and processes, as well as providing guidance, templates and training where appropriate to support the FFPS.

Legal Implications

51. Please see the supplementary advice from the director of law and democracy at paragraphs 54-56.

Financial implications

52. The Fairer Future Procurement Strategy and agreement of this report does not have any immediate financial consequences. Any procurement or in-house provision conducted under the FFPS must be achieved within the council's agreed budget.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Strategic Director of Finance and Governance

53. The strategic director of finance and governance notes the recommendations in this report for a Fairer Future Procurement Strategy. The agreement of the recommendations in this report does not have any immediate financial consequences. Any procurement or in-house provision conducted under the FFPS must be achieved within the council's agreed budget.

Director of Law and Democracy

54. This report seeks the cabinet's approval for the Fairer Future Procurement Strategy (FFPS) and other matters relating to it. By virtue of Part 3B of the council's Constitution, the cabinet has responsibility to consider the promote strategic and council wide initiatives to improve the quality, efficiency and effectiveness of the council's services to the public, and therefore the decision to approve the report recommendations is reserved to cabinet.
55. Council procurement and the FFPS must comply with all applicable EU and UK legislation and guidance. The key considerations and commitments set out in the FFPS are to be delivered in the context of legislation where this is applicable. Legislation includes the Public Contract Regulations 2015, the Equality Act 2010 and the Public Services (Social Value) Act 2012. The contracts team in law and democracy will continue to support in the development of procurement strategies and processes by providing guidance, templates and training on the legal implications and issues surrounding procurement and the FFPS.
56. The cabinet's attention is drawn to the Public Sector Equality duty (PSED General Duty) under the Equality Act 2010, and when making decisions to have regard to the need to (a) eliminate discrimination, harassment, victimisation or other prohibited conduct, (b) to advance equality of opportunity and (c) foster good relations between persons who share a relevant protected characteristic and those who do not share it. The relevant characteristics are age, disability, gender reassignment, pregnancy and maternity, race, relation, religion or belief, sex and sexual orientation. The PSED General Duty also applies to marriage and civil partnership but only in relation to (a). The PSED General Duty is a continuing duty and potential equality considerations should be considered at the different stages of the procurement cycle. The cabinet is specifically referred to the community impact statement at paragraphs 47-49 of the report, and paragraph 17 of the FFPS which sets out the consideration that has been given to equalities issues which should be considered when considering these recommendations.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
Overview & Scrutiny Committee Agenda 19 January 2015	Scrutiny Team 160 Tooley Street London SE1 2QH	Shelley Burke 020 7525 7344
Link: http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=308&MId=4900&Ver=4		
Link: http://moderngov.southwark.gov.uk/ieListDocuments.aspx?CId=302&MId=5138&Ver=4		
Cabinet Agenda 21 July 2015	Constitutional Team Southwark Council 160 Tooley Street London SE1P 5LX	Paula Thornton Paula.thornton@southwark.gov.uk 020 7525 4395

APPENDICES

No.	Title
Appendix 1	Fairer Future Procurement Strategy
Appendix 2	Examples of Blacklisting Evaluation Criteria

AUDIT TRAIL

Cabinet member	Councillor Fiona Colley, Finance, Modernisation and Performance	
Lead Officer	Duncan Whitfield, Strategic Director of Finance and Governance	
Report Author	Elaine Lester, Head of Procurement	
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CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments included
Director of Law and Democracy	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Chief Officers	Yes	Yes
Cabinet Member	Yes	
Director of Public Health	Yes	Yes
Head of Finance and Information Governance	Yes	Yes
Date final report sent to Constitutional Team	26 May 2016	