



Contract For the Removal of Asbestos

January 2016

1 AUDIT AREA

- 1.1 As part of a Lessons Learned exercise the Corporate Director Place requested Internal Audit review aspects of the Asbestos procurement and wider context.
- 1.2 Additionally the Council agreed a motion (fully set out at Annex A) summarised below:
- 1.2.1 To determine what went wrong on this particular contract and based on those findings;
- To recommend any changes / actions with regards to the Procurement process overall;
 - To safeguard tax payers money and to protect the Council's reputation.
- 1.2.2 To provide a full financial evaluation of the costs of this judgement, including legal cost, potential claims for damages and the costs of rerunning the tender process.

2 BACKGROUND INFORMATION

- 2.1 The timeline of original procurement is set out below:
- 2.1.1 The active contract for asbestos removal was due to end 31st August 2015, and was valued at £1.2m per annum. The contractor is AA Woods Ltd
- 2.1.2 Procurement & Commissioning (P&C) (previously known as Corporate Procurement Committee) approved the tender process on 1st October 2013
- 2.1.3 The OJEU notice was published on 15th January 2014
- 2.1.4 P&C meeting approved award 19th January 2015
- 2.1.5 On 13th February 2015 AA Woods Ltd issued proceedings
- 2.2 The action was heard in the High Court, Technology and Construction court between 15th and 17th June 2015. The judgement handed down on 14th July 2015 had the effect of setting aside the tender exercise and the tender process needed to be re-started.
- 2.3 The table below shows all contracts created on In-Tend for the financial year 2014/15.

Contract Value	Number	%	Value	%
£5k to £100k	438	85	£14,027,934	12
Over £100k up to £20m	77	15	£102,835,712	88
Over £20m	0		0	
Total	515		£116,863,646	

2.4 The table below shows live contracts for the financial year 2014/15.

	Number	%	Value	%
£100k to OJEU	30	24	£3,571,233	0
OJEU - £1m	53	43	£22,417,493	4
£1m to £5m	22	18	£54,534,279	9
£5m above	18	15	£550,934,494	87
Total	123		£631,457,499	

3 CONCLUSION

- 3.1 There is overlap between the Council motion requesting an Audit Committee investigation and the Lessons Learned project instigated by management. This investigation has, in many places, been able to rely on the evidence from the Lessons Learned review to minimise duplication.
- 3.2 The Lesson Learned report was considered by Corporate Leadership Team on 8th October 2015. It is appended to this report.
- 3.3 The key findings from this investigation independently mirror the findings derived from the Lessons Learned exercise as summarised below:

3.3.1 Testing highlighted 2 systemic weaknesses where:

- tender evaluation documents were not available or did not sufficiently evidence the accuracy, rationale and quality of scoring, and
- indications were found that joint evaluation was sometimes undertaken as opposed to independent / separate evaluation.

The Procurement Handbook highlights that evaluation notes should be retained and that evaluations should not be undertaken jointly. The sample tested highlights that the controls specified are not being followed.

3.3.2 For the Asbestos Contract specifically, these 2 weaknesses significantly contributed to the ruling against MKC and could be concluded to represent specific errors leading to the court's judgement. Other factors which contributed to the outcome, included delays arising from the need to accommodate the Regeneration programme. However, these did not directly cause what 'went wrong'.

3.3.3 Additionally, in respect of the legal challenge an opportunity was missed to pause to independently consider whether the challenge had merit. External Legal deadlines required the matter to be referred to external legal advice immediately and a view taken within 48 hours. That urgency created a de-facto decision that the challenge would be defended.

That urgency prevented:

- An opportunity to re-check the elements being challenged by Woods

to inform the legal advice being sought and to 'sense check' that advice when received

- The involvement of relevant Senior Managers for both an awareness of the issue and exercising the key decisions that would be needed to determine to defend the claim (or not)

3.4 A financial evaluation of the costs of this judgement is set out below:

Cost type	Costs
Legal costs to be paid to AA Woods	£105k ¹
Damages to AA Woods	£300k ²
Paid to Freeths ³	£116k
Total	£521k
Staff costs in relation to the challenge	£27k ⁴
Staff costs in relation to retender	£45k ⁵

3.5 It is important to note that MKC does not control costs arising from a legal challenge as it is reactive to such proceedings. Once a challenge is lodged the Council cannot avoid incurring additional costs:

3.5.1 A successful defence may recover legal costs and may be awarded opposition costs but will incur internal costs (eg officer time) as a minimum.

3.5.2 To not defend the claim will incur the costs of re-running the tender process and/or further claims from other bidders. This may also increase future claims if the market perceives MKC being risk averse.

3.5.3 To defend the claim and lose, as in this case.

3.6 The need for Senior Management to be involved at key points to 'stop, think and decide' as highlighted through the Lessons Learned is perhaps the key governance learning to best manage the costs and risks when legally challenged.

¹ Costs of the solicitors for AA Woods on account in the sum of £84,700.00 and the balance of the costs of the solicitors for Woods, which are currently estimated at £20,300.00.

² Estimated damages costs at least £300k to be paid IF Woods do not win the current procurement

³ The Councils solicitors includes barrister costs

⁴ Estimated officer hours spent by hourly rate

⁵ Anticipated costs for retender

4 WAY FORWARD

- 4.1 The Lessons Learned report (Table 1 as appended) outlines all the necessary improvements arising from this investigation as a formal Management Action Plan, together with associated timescales and responsibilities.
- 4.2 The Council motion refers to the level of scrutiny applied to decisions by P&C. That is an area that may benefit from considering delegation limits that support the P&C to focus on core values and avoid time being distracted by smaller contracts.

Analysis of contract numbers and values (as outlined at 2.4 above) indicate that Committee scrutiny is best directed towards the high value contracts where a focus on the contracts valued at £1m+ would enable the P&C to scrutinise 98% of contracts by value whilst reducing the number of contracts by 67%.

It is therefore **RECOMMENDED** that the Audit Committee consider recommending that the scheme of delegation be amended to provide for Delegated Decisions for contracts below £1m in value.

5 AUDIT OBJECTIVES AND AUDIT SCORE

To determine what went wrong on this particular contract.

The Council lost the legal challenge because the MEAT (Most Economically Advantageous Tender) evaluation scores of the winning tenderer were not supported by robust explanation. The judge independently scored the tenders resulting in AA Woods achieving a score greater than the winning tenderer.

Evaluation

Two officers worked together to score the tenders rather than carry out the scoring independently. After the scoring the Client Officer expressed concern that the current provider had submitted the lowest tender value and had not won. As a consequence Head of Major Works reviewed the scores (not independently from the existing scores) with the scoring officers resulting in AA Woods score being increased and EAS decreasing. EAS still had highest weighted score. However, there were no notes supporting this review.

When the challenge was made Freeths were asked to review the scores and they agreed with MKCs evaluations. No independent evaluation was carried out by an independent qualified officer prior to submission to Freeths.

Shortly before the trial an error in AA Woods scoring was identified by MKC increasing AA Woods score by 2 bringing them even closer to the winning tender.

The Judge undertook a review of the tenders and EAS scored 64 (a reduction of 40) and AA Woods scored 94 (an increase of 6). He reduced four of EASs scores to zero.

Internal Audit reviewed 6 of the evaluation criteria that the judge determined were wrongly scored and on the evidence that was available

agreed with the judge's determination for 4 of these, but considered that EAS had covered the specified criteria for the other two. Evaluations are open to interpretation but the lack of detailed notes makes it difficult to understand the rationale for some of the scores that had been awarded. No paper notes supporting the rationale behind the scores were made.

A sample of five tenders and the associated evaluation processes were reviewed to understand how evaluations are conducted across the council:

- For one tender the evaluation and moderation was carried out by two officers with no independent scoring and moderation.
- The other tenders were scored individually by the evaluators and in three cases the panel moderated together and one case an independent person undertook the moderation.
- Notes on the completed excel based evaluation sheets, for all 5 tenders, explaining the rationale of scores are limited. These notes do not clearly explain what has been provided to achieve the score given. Neither do they indicate what is lacking where a high score is not awarded. However, paper notes may have been written to support decisions made but these are not needed after the Alcatel Period (period of challenge) has expired.

Model answers were not prepared. The Procurement Handbook states, "it is recommended that Client Officers prepare model answers to assist with the evaluation of the submitted bids".

The Client Officer should consider running some dummy scores through the MEAT model to ensure that the criteria weightings are correct and are fully understood.

Procurement and Commissioning (P&C)

P&C (previously known as Procurement Committee) are presented with all tenders and awards along with a decision report from the officer supported by a confidential summary of the evaluation including the overall scores from each supplier.

The Council motion highlighted concerns regarding the length of meetings. Internal Audit reviewed two meetings and on average they lasted 15 minutes with 8 tenders/awards were reviewed. The Invitation to Tender – Asbestos Removal Contract was discussed on 1 October 2013 along with 9 other contracts at a meeting that lasted 1 hour 19 minutes.

Before P&C all papers are reviewed by Senior Officers (Legal, Finance, Procurement). The lead member is briefed on the detail of the tender/award to enable them to present the paper and has the opportunity to challenge the officers. P&C retains the formal responsibility for tenders and awards that are submitted.

All tender/award decision reports must be recorded on the 28 day forward plan and the papers are provided to committee members at least a week before the Committee giving councillors the opportunity to ask questions

<p>and receive responses in advance of P&C.</p> <p>Best Practice</p> <p>Limited Best Practice in relation to Procurement is available. The Chartered institute of Procurement & Supply (CIPS) provides information but this is strategic rather than operational.</p> <p>Internal Audit reviewed the Procurement Handbooks/Procedure Notes of 4 local authorities. All authorities, as does MKC, require that records of evaluations are kept. One authority requires the use of model answers although stated it did not need to be applied prescriptively. 2 authorities referred to the use of a panel and qualified officers but did not expand on what a panel looks like.</p> <p>MKCs procedures are therefore comparable with other local authorities and best practice.</p>	
<p>That the Council calls for a full financial evaluation of the costs of this judgement, including legal cost, potential claims for damages and the costs of rerunning the tender process.</p> <p>Internal Audit obtained details of all staff that were associated with the challenge and contacted them to establish how long they had worked on the challenge. Legal costs were obtained; both those directly incurred by the Council and the costs that the Council has to pay AA Woods. Damages have also been estimated. The total is £521k and is detailed further in paragraph 3.4 of this report.</p> <p>It is important to note the contingent / internal (ie on cash) nature of some costs.</p> <p>A provision for this issue has been included within the 2016/17 financial budgets.</p>	

Council Motion

- 1) That this Council:
 - a. takes very seriously the role that the Administration and every councillor have in ensuring that tax payers' money is carefully managed and stewarded;
 - b. against this backdrop, notes that
 - i. the Council was taken to Court by Woods Building Services regarding the award of an £8m contract for the removal of asbestos which they claimed had been incorrectly scored;
 - ii. the Council decided to defend its position in court;
 - iii. it appears that the Council did this without first thoroughly investigating and reviewing the scores awarded;
 - iv. in so doing the Council failed to protect tax payers against a claim for costs; and substantial legal costs;
 - v. the Court (July 15) ruled against the Council in favour of Woods and awarded costs against the Council of £122k; and
 - vi. the Court ordered the tender to be rerun and left open a potential challenge for loss of profit from Woods, arising from flawed procurement.
- 2) That having due regard to the fact that contracts of more than £100k are determined by the Council's Cabinet Committee (Procurement and Commissioning), Council believes that this failure may signpost a systemic weakness in the Procurement process for large contracts which needs to be thoroughly investigated.
- 3) That the Council further notes that despite the very significant value of contracts being considered by the Procurement and Commissioning Committee, meetings rarely last more than 30mins.
- 4) That the Council believes that the Procurement and Commissioning Committee may be taking the approach of rubber stamping recommendations, rather than adopting a more challenging and rigorous process with difficult questions being asked and the Council further believes that this approach has potentially serious financial consequences in terms of securing value for money for tax payers and in the safeguarding of public funds.
- 5) That the Council therefore asks the Audit Committee to mount an investigation into what went wrong on this particular contact and based on these findings, to recommend any changes/ actions with regards to the Procurement process overall; with the aim of this investigation being to safeguard tax payers money and to protect the Council's reputation.
- 6) That the Council calls for a full financial evaluation of the costs of this judgement, including legal cost, potential claims for damages and the costs of rerunning the tender process.

Contract for the Removal of Asbestos – E006

Final Report

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