

**Manchester City Council  
Report for Information**

**Report to:** Resources and Governance Scrutiny Committee – 19 July 2022

**Subject:** Ethical Procurement and Forthcoming Changes to Government Procurement Rules

**Report of:** Head of Integrated Commissioning and Procurement

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**Summary**

To update the Committee on the council's approach to ethical procurement with a focus on workforce considerations including blacklisting and to provide an update on changes in Government procurement rules and their potential impact.

**Recommendations**

The Committee is recommended to consider and comment on the information in the report.

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**Wards Affected:** All

<b>Environmental Impact Assessment</b> - the impact of the issues addressed in this report on achieving the zero-carbon target for the city
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There is no direct environmental impact from this report – the issues addressed in the report include measures that will contribute to achieving the zero-carbon target for the city
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<b>Equality, Diversity and Inclusion</b> - the impact of the issues addressed in this report in meeting our Public Sector Equality Duty and broader equality commitments
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The issues addressed in this report will have a direct impact on meeting Public Sector Equality Duty and broader equality developments by ensuring that the council's suppliers demonstrate commitment to support disadvantaged groups identified as priority groups in the council's Social Value Policy
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Manchester Strategy outcomes	Summary of how this report aligns to the OMS/Contribution to the Strategy
A thriving and sustainable city: supporting a diverse and distinctive economy that creates jobs and opportunities	The report outlines how the council's suppliers will contribute towards creating jobs and opportunities to support a thriving and sustainability

A highly skilled city: world class and home grown talent sustaining the city's economic success	The report outlines how the council's suppliers will create opportunities for local people to develop skills to support the city's economic success
A progressive and equitable city: making a positive contribution by unlocking the potential of our communities	The report outlines how the council's suppliers will work with communities to unlock potential
A liveable and low carbon city: a destination of choice to live, visit, work	The report outlines how the council's suppliers will contribute towards achieving carbon reduction targets
A connected city: world class infrastructure and connectivity to drive growth	This report does not include proposals that have specific connectivity implications

Full details are in the body of the report, along with any implications for:

- Equal Opportunities Policy
- Risk Management
- Legal Considerations

#### **Financial Consequences – Revenue**

None

#### **Financial Consequences – Capital**

None

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#### **Background documents (available for public inspection):**

The following documents disclose important facts on which the report is based and have been relied upon in preparing the report. Copies of the background documents are available up to 4 years after the date of the meeting. If you would like a copy please contact one of the contact officers above.

The principal policies referred to in this report are:

- Manchester City Council's Ethical Procurement Policy
- Manchester City Council's Social Value Policy

## **1. Introduction**

- 1.1. Manchester City Council has long been recognised for having a progressive approach to procurement. This is evidenced by an ongoing annual analysis of the effect of the council's own spend on the local economy that commenced in 2007, early adoption of the Social Value Act 2012 and has developed over the years into an Ethical Procurement Policy that was adopted by the council in 2016. This report outlines how the approach to Ethical Procurement is applied, with a focus on workforce considerations including blacklisting.
- 1.2. This report also provides an update on changes in Government procurement rules and their potential impact with specific reference to Ethical Procurement.

## **2. Background**

- 2.1. The council has a long track record – nearly 15 years – of promoting ethical procurement and social value. The council was a pioneer in these aspects, introducing what was then its Sustainable Procurement Policy in 2008, well before the Public Services (Social Value) Act 2012 came into force.
- 2.2. Over the years the council has refined its policies and expanded its efforts, introducing, for example, the 20% social value weighting in the evaluation of all tenders, going beyond the requirements in the Act. The 20% social value weighting remains, to our knowledge, the joint highest in the country, and is now enhanced with the additional 10% weighting with respect to climate change and environmental actions.
- 2.3. Today, the council's procurement approach is guided by two key policies – the Ethical Procurement Policy and the Social Value Policy. The two are closely connected and even more so now, as social value considerations are increasingly interested in what the bidder / supplier is doing within their organisation, as well as what they will deliver as part of the contract – for example, whether an organisation pays well (and at least Real Living Wage), whether it applies good employment practices, how it takes action to reduce its carbon footprint.
- 2.4. The Ethical Procurement Policy sets out the council's expectations on ethical practices that it expects all suppliers to commit to and promote within their own supply chains. The policy covers key basics, such as compliance with laws, but also commends various good practices. The policy includes consideration of a number of workforce issues including "employment" in terms of improving working conditions, paying a living wage, Health and Safety, a right to be part of a trade union, child employment, working hours, regular employment, apprenticeships, abuse, equality, access to training, promotion, termination or retirement.
- 2.5. Subsequently there have been specific commitments to a range of initiatives that support the Ethical Procurement policy including:

- Publication of a Human Trafficking and Modern Slavery statement in 2019, two years prior to the introduction of a requirement for public sector organisations to do so.
- Signature of the Unite Construction Charter
- A commitment by the council that its suppliers will pay the real living wage leading to accreditation as a RLW Employer by the Living Wage Foundation in 2019
- The Unison Ethical Standards Charter for social care
- Adoption of the Care Leavers Covenant since 2020
- Recognition of the Armed Forces Covenant since 2020
- Realisation of a commitment to pay RLW rates to all social care providers from April 2022
- A commitment to becoming a real living wage city

2.6. The Ethical Procurement Policy is appended to this report. Page 1 lists the various developments in the policy since 2017 including those listed above.

2.7. The Social Value Policy complements the Ethical Procurement Policy, by setting out priorities for how suppliers can create additional social value both through their organisation and with regard to the specific contract(s) they are delivering for the council. The policy has six overarching objectives, consistent with the framework adopted across Greater Manchester, which are as follows:

- Provide the Best Employment You can
- Create the Education, Work and Skills opportunities our residents need
- Be Part of a Strong Local Community
- Develop a Local and Resilient supply Chain
- Make Your Organisation Greener
- Keep the Air Clean

2.8. The Social Value Policy was first published in 2014 and subsequently updated in 2017 and 2021. The current version was updated and the priority cohorts augmented to include those adversely directly and indirectly affected by the Covid-19 pandemic.

- Children and young people, specifically: looked after children and care leavers, young people who are Not in Employment, Education, or Training (NEET) or at risk of becoming NEET; and young people involved in or at risk of being involved in the criminal justice system.
- Long-term unemployed with an underlying health condition or complex needs, including, the over 50s who have, on average, been hit harder economically by the Covid-pandemic.
- Promoting equality for Black, Asian and Ethnic Minority residents, who research shows have been disproportionately impacted by the Covid-pandemic
- Disabled people.
- Older people; and
- Vulnerable adults overcoming a crisis or, domestic violence and abuse, rough sleepers.

2.9. The council applies these policies in its procurements in several ways:

- the council promotes the aims of the policies through, for example, general market engagement events, or through market briefing events on a specific procurement.
- all invitations to tender by default include a 'standard questionnaire', which enables the council to exclude bidders if they have committed serious violations, such as illegal activity, breaching of labour, environmental, social obligations etc.
- There are the scored social value and environmental questions, which together make up 30% of the total score in the evaluation of tenders. Social value questions will vary reflecting the nature of the opportunity, but they will nearly always ask bidders what they are already doing to create social value, as well as what they will deliver as part of the contract.
- There are also additional standard questions which are not scored but which provide further detail on underpinning ethical practices, including payment of Real Living Wage, whether zero hours contracts are used, among others.

### 3. Main issues

3.1. The Public Services (Social Value) Act 2012, gives the council the freedom, and indeed the legal duty, to consider "(a) how what is proposed to be procured might improve the economic, social and environmental well-being of the relevant area, and (b) how, in conducting the process of procurement, it might act with a view to securing that improvement."

3.2. There are however some limitations on what councils can do. The first is practicability and ensuring that invitations to tender are not too onerous, for example in the number of questions and data required, to put organisations off from bidding, particularly small and medium-sized enterprises. The second is that there are legal limitations on what the council can consider when procuring. In particular section 17 of the Local Government Act 1988 states that "*It is the duty of every public authority .....in relation to its public supply or works contracts..... to exercise that function without reference to matters which are non-commercial matters*". The Act defines several non-commercial considerations and relevant examples of matters that can not be taken into consideration include:

- the terms and conditions of employment by contractors of their workers or the composition of, the arrangements for the promotion, transfer or training of or the other opportunities afforded to, their workforces;
- whether the terms on which contractors contract with their sub-contractors constitute, in the case of contracts with individuals, contracts for the provision by them as self-employed persons of their services only;

- the conduct of contractors or workers in industrial disputes between them or any involvement of the business activities of contractors in industrial disputes between other persons.
- 3.3. Some specific questions on ethical practices, are not scored or considered for the purposes of awarding contracts whereas those within the Standard Questionnaire and in relation to Social Value, which are both legally permitted, are scored. Thus it is possible that a contract or a place on a framework may be awarded to a supplier that is considered weak in relation to these matters. In such circumstances, the supplier is asked to set out proposals to rectify the situation and implementation of agreed measures with then be monitored.
- 3.4. **In specific reference to blacklisting**, the position is set out on pages 6 and 7 of the Ethical Procurement policy. A report was considered by the Resources and Governance Scrutiny Committee on this subject in August 2018 (see appendix 2). The report outlines that suppliers, service providers and contractors shall not unlawfully compile, use, sell or supply a prohibited list which:
- a. contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and
  - b. is compiled with a view to being used by employers or employment agencies for the purpose of discrimination in relation to recruitment, or in relation to treatment of works within the meaning of The Employment Act of 1999 (Blacklists) Regulations 2010
  - c. contains details of persons who are or have been involved in whistleblowing to appropriate bodies as a result of becoming aware of any deficiency in service provision, impropriety, fraud, customer abuse, breach of procedure or maladministration.
- 3.5. **Changes to UK Procurement Regulations** are currently under consideration as the Local Government Procurement Bill is considered by Parliament during the current term. A green paper was published in October 2020 outlining proposals for the new procurement regulations. Consultation closed in February 2021 and drew over 600 responses and this delayed the introduction of the Bill until May 2022.
- 3.6. The new regulations that will result from the Act, once passed, are likely to be in force from mid 2023 onwards. The Procurement Bill includes a set of new procurement procedures that will introduce more flexibility and, for example, encourage a greater level of negotiation with potential suppliers.
- 3.7. The following paragraphs provide an outline of some of the proposals but, as the Act is currently going through Parliament, there may be some changes as a result of the debates and committee stages.
- The new regulations will replace the seven existing procurement procedures with three new simplified approaches:

1. **Flexible procedure** that gives freedom to negotiate and innovate to get the best from the private, charity and social enterprise sectors
  2. **Open procedure** for simpler, 'off the shelf' competitions
  3. **Limited tendering procedure** to use in certain circumstances, such as crisis or extreme urgency
- The flexible procedure is expected to be used for most procurements and the regulations will be less prescriptive than the 2015 regulations which were often criticised for being inflexible.
  - The consultation included several proposals which were removed or amended in the light of responses received. Some have been abandoned and, as the Government is keen to avoid further delay and ensure that the new rules are in place as soon as possible, others which require careful drafting and further consultation will be introduced in coming months through new Statutory Instruments or Procurement Policy Notes ("PPN"s).
  - A proposal to abolish the Light Touch Regime, the process under which certain listed services are subject to less rigorous procurement rules, has been reversed and the procedure will be retained with some modification.
  - The Green Paper included new regulations on transparency and publication of data relating to procurement that are intended to address issues created by misinterpretation of the data already published. One proposal is to link published data on spend to actual contracted activity which will require significant modification to finance systems. This is one aspect that will be developed separately and included in an SI to be issued in due course.
  - There are proposals to strengthen approaches to exclusion of suppliers for misconduct (eg fraud, corruption or poor performance) which will result in the introduction of a new exclusions framework that is simpler, clearer and more focused on suppliers who pose an unacceptable risk to effective competition for contracts, reliable delivery, and protection of the public, the environment, public funds, national security interests or the rights of employees.
  - One aspect of the current regulation that will be changed is the ability of unsuccessful suppliers to challenge a contract award. The proposals will introduce a fast track way of resolving disputes over tender awards which will, for example, prevent an incumbent supplier from challenging the award of a new contract to another provider in order to retain a current contract and also make it simpler and quicker to resolve any issues that may arise.
  - Another change is in relation to current Regulation 77 which allows contracting authorities to directly award contracts to VCSEs in certain limited circumstances such as to pilot new services. This provision has been little used due to restrictions but is likely to be strengthened to allow contracts for up to 5 years instead of the 3 years under the current regs. This will help councils to test new ways of delivering services over a meaningful period that, if successful, will stimulate VCSE growth and allow some certainty for these organisations.



- The National Procurement Policy Statement was published as PPN 05/21 in June 2021 but has not yet been implemented due to technical legal issues. The PPN requires contracting authorities to have regard to national strategic priorities for public procurement alongside any additional local priorities. The PPN states that Contracting Authorities should consider the following social value outcomes:
  - Creating new businesses, new jobs and new skills in the UK
  - Improving supplier diversity, innovation and resilience
  - Tackling climate change and reducing waste
- The provisions of this PPN are now encompassed in the Procurement Bill and include establishing an “oversight unit” based at the Cabinet Office. This is considered necessary to support the introduction of the new less stringent regulations. The general role of the new unit will be to oversee and spread best practice and enable all contracting parties to benefit from lessons learned which in turn should drive improvements in practice.
- The unit will be known as the Procurement Review Unit and will also have powers to deal with contracting authorities that regularly breach the regulations.
- The Unit is intended to have 2 main purposes:
  - Monitoring – including of issues raised as the new rules are implemented, and to ensure understanding and compliance
  - Intervention – including the issue of improvement notices to individual contracting authorities. Recommendations would be enforceable by sanctions, yet to be confirmed, such as spending control measures

3.8. The Cabinet Office plan to produce a detailed and comprehensive package of published resources (statutory and non-statutory guidance on the key elements of the regulatory framework, templates, model procedures and case studies). In addition, a programme of learning and development is being prepared and implemented to meet the varying needs of stakeholders.

3.9. Once the Bill becomes an Act, expected to be within the current parliamentary term, there will need to be secondary legislation (regulations) to implement specific aspects of the new regime. There will be a six months’ notice of “go-live” once the legislation has been concluded, in order to support effective implementation. Given the timescales around the legislative process, the new regime is likely to come into force in the second half of 2023.

3.10. It is relevant to note that, in parallel, the Health and Care Act 2022 includes provision that will establish a “Provider Selection Regime” (“PSR”) which will be a new set of rules replacing the existing procurement rules for arranging healthcare services in England. Again, legislation is not yet fully formed but this includes a mechanism to avoid unnecessary competition in certain limited circumstances and to direct award contracts where it is considered that tendering would be unlikely to generate sufficient interest from suppliers to justify the exercise.

#### **4. Recommendations**

The Committee is recommended too consider and comment on the information in the report

#### **Appendices**

1. The 2016 MCC Ethical Procurement Policy
2. 6 September 18 Report to R&G Scrutiny on Blacklisting
3. The 2021 Manchester City Council Social Value Policy