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**Subject:** Helensburgh CHORD procurement of public realm works  
**Date:** 11 June 2012

## **1 Background**

- 1.1 The Council issued an Invitation to Tender (ITT) for public realm works under the Helensburgh CHORD scheme, based on a fixed specification and to be evaluated on a lowest price basis. The tender return date was 10 May 2012. Ten tenders were received.
- 1.2 On 22 May 2012, the elected members of the Council passed a motion in relation to that procurement; the result of the motion is that the current procurement process has been suspended until a public consultation has been carried out in relation to the design of the works.
- 1.3 The Council has requested advice in relation to the procurement law issues with the decision to suspend the current tender process, and any subsequent decision to vary the specification of works.
- 1.4 The procurement issues can be summarised as:
- 1.4.1 the implication of delays to current tender timescales and the validity of tenders; and
  - 1.4.2 the effect of material changes to the specification of works originally tendered for.

## **2 The Consultation**

- 2.1 The motion passed by the Council proposes a number of options to be put to members of the public relating to the design of public realm works in Helensburgh.
- 2.2 These options are:
- 2.2.1 Option 1: to maintain the current tender specification;
  - 2.2.2 Option 2: to use the existing road layout but change elements of the design, including changes to the proportion of paved and green space; and

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2.2.3 Option 3: to change the existing road layout and elements of the design, including changes to the proportion of paved and green space.

2.3 Adoption of Options 2 or 3 following the public consultation will result in changes to the current tender specification.

### **3 Delays and tender validity**

3.1 The issue of delay and tender validity will arise where Option 1 is adopted following the public consultation. As this Option is based on the current tender, no changes would be required to the specification of works, although issues may arise as a result of the delays to the process.

3.2 The current tender validity, as set out in the ITT, is "3 calendar months from date fixed for lodgement of Tenders". As the tender return date was set as 10 May 2012, this means that bids will expire and may be withdrawn by tenderers on 10 August 2012.

3.3 If the public consultation can be concluded within the tender validity period (i.e. before 10 August) and Option 1 was selected by the public, then the current bids would still be open for acceptance by the Council on their current terms and pricing.

3.4 If the public consultation cannot be concluded within the tender validity period, the lowest risk approach to the Council would be to abandon the current tender exercise and re-tender with a revised validity period and start date. The procurement risk exists because a losing bidder can argue that the outcome of the tender may have been different had the competition been run on the basis of a later start date. There is also a risk of a challenge coming from outside the pool of bidders, arguing that the delay is a material change to the opportunity originally advertised, and therefore there is now a new opportunity which they are being denied the opportunity to bid for.

3.5 If the delay is short, the risk is relatively low. If the tender validity deadline was missed by a short period, say up to 3 months, then we consider there to be a low risk of successful challenge, provided the current first-placed bidder was willing to hold its tender price.

3.6 Even with a short period of delay, the risk increases if the current first place bidder will only agree to an extension on the basis of a negotiated increase in price, or some other change to the contract terms. In that situation we would suggest that all bidders are given the opportunity to re-bid on the basis of an extension to tender validity.

3.7 The risk of challenge will increase if any extension to tender validity goes beyond that indicative 3 month limit. In these circumstances, the Council should consider re-procuring the works.

3.8 It must be noted that the 3 month period is not prescribed by procurement law and there is no identifiable point at which the risk becomes "too high". We suggest 3 months as a rule of thumb.

#### 4 Material Change

- 4.1 Public procurement law is clear that changes to the terms of an existing tender process, or to what is to be done pursuant to the terms of a contract, will in some circumstances be impermissible.
- 4.2 The procurement law principle is that if there is an additional requirement, or a changed requirement, that should be the subject of a new procurement exercise, and not achieved by negotiation between existing parties.
- 4.3 Not all changes during the tender process have this result, and a test of materiality applies.
- 4.4 The judgement from the leading case in the European Court of Justice on this topic<sup>1</sup> related to changes during a contract rather than during the tender process, but the same principles apply. That case confirmed the principle as follows:
- "...amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract ... when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract ..."*
- "...an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered."*
- 4.5 The changes envisaged, namely changes to the contract commencement date and potential changes to the specification are such that they form the essential terms of the contract.
- 4.6 As such, it is our view that these changes would pass the materiality threshold. The lowest risk option is to re-procure.
- 4.7 It would be a very high risk just to re-negotiate with the current preferred bidder and a less risky approach would be to issue any revised specification to the existing ten tenderers to give each of them the opportunity to re-price. However, given the time which would be required to prepare a revised specification and to allow tenderers to prepare a response, the timescales are similar to re-running the procurement exercise.
- 4.8 As such, in the event that the works proceed on the basis of a revised specification, our advice would be for the Council to conduct a fresh procurement exercise.
- 4.9 The Council has no liability to tenderers for any costs either in relation to their tender preparation or as a result of any abandonment of the current tender process – this liability is explicitly excluded in paragraph 1.10.2 of the ITT.

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<sup>1</sup> ECJ in Priesstext Nachrichtenagentur GmbH v Austria, Case C-454/06

**5 Communications with tenderers**

- 5.1 Once the outcome of the public consultation is known, the Council will need to consider how best to deal with the market and the communications which are given to the current tenderers.
- 5.2 We would be happy to provide advice on the content of any such communications.

**Brodies LLP****11/06/2012**