

**CARDIFF COUNCIL
CYNGOR CAERDYDD**



CONSTITUTION COMMITTEE:

18 SEPTEMBER 2013

**REPORT OF THE COUNTY CLERK & MONITORING OFFICER
AGENDA ITEM: 8**

Procurement and Property Decision Making Review

Reason for this Report

1. To allow Members to consider current decision making arrangements in respect of procurement and property matters and the potential areas for review; and to establish a task and finish group to make recommendations on changes to current arrangements to a future meeting of this Committee.

Background

2. The Council is required to keep its Constitution under review and has delegated this function to the Constitution Committee as follows:

‘To review the Council’s Constitution, and to recommend to Council and/or the Cabinet any changes, except that the Committee will have authority (subject to the Monitoring Officer’s advice) to make the following changes on behalf of the Council:-

(a) Drafting improvements to enhance clarity and remove minor anomalies.
(b) Updating to reflect legislative changes and matters of record.
(c) Amendments to the Financial, Contracts and Land Procedure Rules (subject to the advice of the S.151 Officer being sought).’
3. The Constitution Committee at its meeting on 20th September 2012 agreed a timetable to review the Constitution and, in line with that timetable, the current area for review is delegations, or more widely, decision making arrangements.
4. At its last meeting, on 14th May 2013, the Committee considered a report titled ‘Review of Decision Making Arrangements – Scoping Report’ (“the Delegations Scoping Report”). The Committee agreed that the first area for review would be procurement and property related decision making, and instructed the

Monitoring Officer to submit a scoping report on decision making in this area to its next meeting. This is that report.

Issues

5. In discharging its functions, the Council undertakes a diverse range of procurement and property related transactions, which vary considerably in financial value as well as complexity and sensitivity. The Council's decision making arrangements need to balance proper democratic process on the one hand, so that significant decisions are taken by Members who are accountable to the electorate, with operational expediency on the other hand, which requires officers to have delegated authority to make the numerous routine administrative and operational decisions required on a daily basis in a timely and efficient manner. In either case, the decision making arrangements need to ensure that decisions are taken with appropriate transparency and have due regard to all necessary professional advice, and that there are suitable checks and balances to ensure propriety and accountability.
6. An explanation of the procurement and property related transactions undertaken by the Council, the relevant legal obligations and the current decision making arrangements in respect of each are set out in **Appendix A** (Procurement) and **Appendix B** (Property) respectively.
7. As noted in the Review of Decision Making Arrangements - Scoping Report submitted to this Committee on 14th May 2013, the functions of a local authority are allocated by law as either Council Functions or Executive Functions (or Local Choice Functions, which the Authority must delegate to either the Council or its Executive). Decisions in respect of procurement and property matters are, by law, Executive Functions, subject to compliance with the budget and policy framework approved by Council.
8. By law, the Council may approve a Scheme of Delegations allocating responsibility for Executive Functions between (i) the Cabinet; (ii) any Member of the Cabinet; (iii) any Committee of the Cabinet; and (iv) any officers of the Authority. The current allocation of responsibility is set out in the Scheme of Delegations in Part 3 of the Constitution, and allocates responsibility between the Cabinet and officers. Any functions allocated to the Cabinet may be delegated by the Cabinet to a Committee of the Cabinet or to an officer. WAG Guidance advises that the Scheme of Delegations determined by the Council should be sufficiently flexible to ensure the executive can discharge functions efficiently and effectively (Guidance for County and County Borough Councils in Wales on Executive and Alternative Arrangements 2006, paragraph 4.16).
9. It is therefore suggested that the Cabinet's views should be sought on any proposed changes to the decision making arrangements in respect of procurement and property matters, prior to submitting any recommended amendments to the Scheme of Delegations to full Council for approval.

Potential areas of decision making for review

10. Members are invited to consider which aspects of the decision making arrangements in relation to procurement and property matters they wish to review. Some potential areas for review are set out in paragraphs 11 to 38 below for the Committee's consideration.

Members' involvement

11. As noted above, most procurement and property related decisions are, by law, 'executive decisions', which means that they must be made by either the Cabinet (collectively or by individual Cabinet Members) or by officers under delegated powers. (The main exception to this is any decision which is outside of, or contrary to, the policy and budgetary framework, which must be taken by Full Council, eg. Project Gwyrdd procurement).
12. As noted in paragraph 5 above, significant, strategic or key decisions on major projects are properly reserved to the Cabinet, but delegation of operational and administrative decisions to officers is essential to allow for expedient and timely decision making.
13. The Delegations Scoping Report considered by this Committee on 14th May 2013 noted that the Chair of the Community and Adult Services Scrutiny Committee, Councillor Patel, has expressed the view that there should be more Member input into procurement decisions. Members may be involved in the decision making process as decision makers, either collectively or individually, or as consultees, and each of these is addressed in the paragraphs below.

Full Cabinet

14. Having regard to paragraph 12 above, Members may wish to review the decisions which are currently reserved to the Cabinet collectively, as set out in **Appendices A and B**, and consider whether they wish to make any changes in this regard. For example, to change the threshold values, or the circumstances in which, or the stages at which, a matter should be referred to full Cabinet for decision.

Individual Cabinet member decisions

15. The law also allows the Authority to grant decision making powers to individual Cabinet Members. The exercise of delegated authority by an individual Cabinet Member is subject to the same requirements as applicable to any other 'executive decision', such as appropriate consultation, advice and record keeping, and is also subject to call-in and scrutiny by a Scrutiny Committee. However, there is no provision for individual Cabinet Member decision making in the Council's current arrangements.

16. As noted in the Delegations Scoping Report, the Administration has indicated that it would like to introduce arrangements to delegate responsibility within defined financial limits to individual Cabinet Members, who in turn should be allowed to delegate decision making within defined limits to officers. Such arrangements are permissible by law.
17. Members may wish to note that, in 2002/03, this Authority had an Executive Functions Scheme of Delegations under which individual Cabinet Members had delegated authority, within their areas of responsibility, to make various decisions including:
- Approving acceptance of tenders valued from £1,000,000 to £5,000,000; and
 - Approving the sale or purchase of land valued £1,000,000 to £5,000,000 (Cabinet member with responsibility for Resources).

Under current arrangements, authority for both of the above matters rests with the Chief Executive, Corporate Directors and Directors of the Council.

18. The Committee is invited to consider whether it wishes to further consider the issue of decision making by individual Cabinet Members.

Consultation with Members

19. Under the Authority's current Scheme of Delegations, when a matter is delegated to officers there is a general obligation to 'keep Members properly informed of activity arising within the scope of [the delegation]' (Scheme, Section 4A paragraph 1.5).
20. In addition to the general obligation above, certain officer delegations stipulate specific consultation requirements. For example, the delegation to declare operational land surplus to the Council's requirements (FS52)) states that Ward Member consultation is required and, if such Member objects, the matter must be reported to the Cabinet for decision.
21. Members may wish to consider whether the current Member consultation requirements remain appropriate or whether they should be reviewed.

Scrutiny members

22. The involvement of scrutiny members in the decision making processes is considered under the heading 'Transparency and Scrutiny of Decision Making' below (paragraphs 31 – 35 below).

Decision making by Officers

23. Whilst decisions concerning or impacting upon policy, budget, strategy, and quasi-judicial matters (such as planning and licensing) are properly reserved to elected members who are accountable for their decisions to the electorate, there are very many operational and administrative decisions required to be

taken on a daily basis, which may properly be delegated to officers to ensure the efficient and effective conduct of the Council's business.

24. Procurement and property related transactions commonly comprise a number of stages (as outlined in **Appendices A and B**). For high value transactions, a Cabinet decision may be sought to authorise the commencement, budget and scope of the transaction, but subsequent decisions required to progress and complete the transaction may be dependent on professional judgment and or governed by legislation (eg. the procurement regulations provisions on the evaluation of tenders), which are matters that may properly be delegated to officers, subject to compliance with the budget and scope approved by Cabinet.
25. Under the current arrangements, officers are given delegated authority, under both the Scheme of Delegations in general and also pursuant to Cabinet decisions on specific matters, to take most operational decisions, up to high financial thresholds, provided they are in accordance with the Authority's approved budget and policy framework and relevant procedure rules.

New management structure

26. Members will be aware that the Council is currently in the process of making appointments to its revised senior management structure. It is recommended that a general review of officer delegations should be undertaken once all appointees are in post.
27. Members are also asked to note the following:
- (i) Assistant Directors - As several Assistant Director posts remain vacant, decisions which would normally be taken at this level (eg. award of contracts valued between £250K and £1 million) are currently being referred up to the Directors of those service areas without an Assistant Director. Whilst the understanding of the relevant Scrutiny Rules was that all Director decisions should be published and subject to call-in, this was a matter of interpretation, and was reported to be causing significant operational problems. In order to alleviate the concerns which arose and to allow service areas to get on with day to day contracting during this transitional period, the Monitoring Officer's delegated powers were used to clarify that the publication and call-in provisions would apply only to those decisions made in exercise of a Director level delegation. This means that whilst decisions relating to contracts valued over £1 million will continue to require a Director's published decision (no change here), decisions relating to contracts valued between £250K and £1 million, which would not be published if authorised by an Assistant Director, will not be required to be published simply because the decision was made by a Director. This clarification was made subject to this Committee's review of decision making arrangements, and Members will note that issues regarding the transparency of decisions are identified below as a potential area for review.

- (ii) Property delegations FS29-FS49 & FS52 regarding the disposal and acquisition of land are currently assigned to the Corporate Director, Resources in the 'Statutory Officer' delegations section, Sub-Section 4E of the Scheme. These delegations include power to authorise disposals valued up to £1 million. (The Corporate Director, Resources, was previously the Council's Statutory Section 151 Officer). However, under the revised management arrangements, responsibility for the Strategic Estates Division now falls with the Director of Economic Development. Consideration needs to be given to the proper allocation of these delegated powers.

Thresholds

- 28. The financial value of a procurement or property transaction is a key factor in determining its significance to the Council, and the higher value transactions need to be authorised by a decision maker with a commensurate level of accountability and responsibility within the Council. Clearly this means that the higher value transactions will be reserved to elected Members who are accountable for their decisions to the electorate, and below that to officers at appropriate levels of seniority. However, the financial thresholds must also allow for efficient and timely decision making, having regard to the number of relatively high value transactions which the Council is required to complete on a daily basis.
- 29. Members are invited to consider whether they wish to review the current thresholds, as set out in **Appendices A and B**.

Specific types of transactions

- 30. It suggested that Members may wish to consider decision making arrangements for specific types of procurement or property matters, in view of their particular sensitivity or significance to the Council or involving innovative approaches to service delivery. By way of examples: (i) social services procurements, which tend to be sensitive in nature with the Council having to carefully consider how to best meet the needs of the individuals who require the services within the available resources; and (ii) disposal of premises providing direct services to the public or a disposal or acquisition where well being benefits impact on the terms.

Transparency and Scrutiny of Decision Making

- 31. As noted in the Delegations Scoping Report, decisions taken by the Cabinet, collectively or individually, are required by law to be published and are subject to call-in. Decisions of the Cabinet are accordingly published on the Council's intranet site. However, there is no legal requirement for authorities in Wales to publish executive decisions taken by officers. WAG Guidance advises that officer decisions should be recorded and made publicly available on request, but leaves the precise arrangements to individual authorities to determine as a matter of good practice.

32. The Council's arrangements in respect of publication and call-in of officer decisions are set out in **Appendices A and B**. Members will note that those officer decisions which are not currently required to be published or subject to scrutiny call-in include some significant decisions, such as:
- (i) In respect of procurement matters,
 - Contract decisions made by Chief Officers / Assistant Directors (under Scheme of Delegations reference CO3, or a specific delegation from the Cabinet) - with a value of up to £1 million (or potentially higher under a specific delegation from the Cabinet); and
 - Decisions regarding framework agreements which may have been delegated by the Corporate Director, Resources to, for example, the Procurement Operational Manager, which may be valued up to £5 million; and
 - (ii) In respect of property matters,
 - Decisions on property disposals valued up to £1 million, which have been delegated by the Corporate Director, Resources to the Strategic Estates Manager.
33. Members will note the issues reported regarding publication of Assistant Director level decisions, as set out in paragraph 27(i) above.
34. The Committee is invited to consider whether it wishes to review the Council's arrangements regarding publication and call-in of officer decisions.
35. Members may also wish to consider scrutiny arrangements more widely, in particular, whether the current arrangements for pre-decision scrutiny are providing sufficient early sight and effective involvement in matters of interest; and whether the call-in criteria and or procedures may require review. If Members wish to consider this area, further information can be provided on the relevant provisions of the Scrutiny Procedure Rules, and views sought as appropriate from Scrutiny Committees and officers.

Other issues

36. Members are invited to consider whether there are any other aspects of the decision making arrangements for procurement and property matters which they would like to review.
37. It was noted in the Delegations Scoping Report, that the Council's Contract Standing Orders are currently being reviewed by a team of officers, and that revised rules are being drafted to reflect model rules issued by the Welsh Local Government Association and developments in procurement law and practice. As any proposed changes to the decision making arrangements in respect of procurement matters will also need to be reflected in the new draft Contract Rules, it is suggested that the Monitoring Officer should be asked to co-ordinate this work and bring back a single report to the Committee on revised procurement rules and decision making arrangements.

38. It was also noted in the Delegations Scoping Report, that the revised procedural policy on the Disposal of Council Property (approved by Committee in January 2011) required certain amendments to be made to ensure clarity and consistency within the Constitution. Again, it is suggested that the Monitoring Officer should be asked to co-ordinate this work and bring back a single report to the Committee on recommended changes to the property decision making arrangements and procedures.

Legal Implications

39. The Local Government Act 2000 and the Local Authority Constitution (Wales) Direction 2002 requires the authority to keep its constitution under review and up to date. Article 14 of the Constitution provides for such review and amendment, and requires that any changes to the Council Scheme of Delegations or Scrutiny Procedure Rules must be approved by full Council.

40. There are no direct legal implications arising from the recommendations of this report.

Financial Implications

41. There are no financial implications arising from this report

Recommendations

The Committee is recommended to:

- (i) Note the information contained in the report and make any appropriate comments;
- (ii) Agree the aspects of procurement and property related decision making arrangements which the Committee wishes to review;
- (iii) Establish a Task and Finish Group, with appropriate terms of reference, to undertake the above review on behalf of the Committee;
- (iv) Instruct the Task and Finish Group to report back to a future meeting of this Committee with recommendations on changes to the current decision making arrangements within the scope of its review;
- (v) Request the Monitoring Officer to co-ordinate the work of the Task and Finish Group with the ongoing work on procurement and property procedures, as noted in paragraphs 37 & 38 of this report, and to incorporate all relevant recommended changes in the report/s back to this Committee; and
- (vi) Note that any recommended changes made pursuant to recommendations (iv) and (v) above will be subject to (a) consultation with the Cabinet and (b) the approval of Council.

Marie Rosenthal
County Clerk and Monitoring Officer

4th September 2013

Appendices

Appendix A – Procurement Decision Making Arrangements

Appendix B - Property Decision Making Arrangements

Background papers

Constitution Committee, Report of the Monitoring Officer, 'Review of Decision Making Arrangements – Scoping Report', 14 May 2013

APPENDIX A

Procurement Decision Making Arrangements

Background information

1. Procurement is the process by which the Council manages the acquisition of all its goods, services and works.
2. The Council spends in the region of £300 million per annum on the external procurement of goods, services and works. It is important that the Council strategically manages this spend, both to ensure that it maximises value for money through its economies of scale, and to achieve the vision for procurement which is set out within the Council's Commissioning and Procurement Strategy (2011-15).
3. The table below shows the contracts entered into by the Council during the year 2012/13, with the estimated total value (and number) of contracts for each band of contract value.

Range	Estimated Value of Contracts*	Number of contracts
£10,000 - £24,999	1,037,813.54	62
£25,000 - £74,999	4,569,795.68	105
£75,000 - £149,999	5,394,792.46	49
£150,000 - £249,999	4,030,065.00	21
£250,000 - £499,999	8,215,541.79	24
£500,000 to £999,999	9,670,181.00	14
£1 million up to £2 million	4,100,000.00	3
£2 million up to £5 million	36,244,000.00	11
Above £5million	167,500,000.00	3
TOTAL	240,762,189.47	292

Table 1 - Estimated Contract Value and Number of Contracts based on contracts registered on Alito for 2012/13

* Note: this is the total estimated value of contracts over the full duration of each contract (which may run for several years)

Legal requirements

4. In all its procurements the Council must ensure that it obtains value for money and the required level of quality and performance. All procurements must comply with the EU Treaty based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality; and for procurements above the specified financial thresholds, the Council must also

comply with the EU procurement directives and the regulations which implement those directives in the UK. There are also various other relevant legal requirements, including those related to staff transfers (TUPE, pensions etc), health and safety and equalities. The Council's Contract Standing Orders provide the corporate framework for all Council procurements.

Stages in the procurement process

5. The procurement process typically includes the following stages:
- (i) the identification of need and consideration of options to meet the identified need (e.g. can the need be met by in-house provision, under an existing framework agreement, using a grant arrangement, a collaborative working arrangement, or should a contract be let);
 - (ii) selection of procurement process, specification of goods, services and or works to be procured, setting criteria for the selection of tenderers and for the award of the contract;
 - (iii) issuing invitations to tender;
 - (iv) evaluation of tenders;
 - (v) contract award; and
 - (vi) management and review of the contract/s.

Decisions required

6. Formal decisions are sought at the 'Pre-Tender' stage, to authorise the decision to put a contract out to tender (addressing matters considered during stages (i) to (iii) above); and 'Contract Award' stage, to authorise the award of the contract to the successful tenderer (addressing matters considered during stages (iv) and (v) above). A further decision is required to authorise any variation which may be necessary during stage (vi) above.

Authority for decisions

7. Under current arrangements, procurement decisions may be taken, dependent on the value of the procurement, as follows:
- Over £5 million – reserved to the Cabinet
 - Up to £5 million - Chief Executive, Corporate Directors and Directors
 - Up to £1 million - Assistant Directors and Chief Officers
 - Up to £250,000 - Operational Managers
8. However, Members should note well that any procurement outside the budgetary framework requires the approval of full Council (for example, Project Gwyrdd.)

There are also specific rules for:

(i) Framework agreements

9. Framework agreements are agreements with one or more contractors, made for the purpose of establishing the terms which will govern any number of 'call-off'

contracts which may be awarded under the framework agreement. The specific provisions for framework agreements reflect their relatively high monetary value and potential utility Council-wide. The current provisions for framework agreements are as follows:

- Framework agreements valued over £5 million (or, if the proposal is to award the contract to a tenderer who is not the lowest price, a framework agreement valued over £1 million) – contract award is reserved to the Cabinet; and
- All other decisions on framework agreements – delegated to the Corporate Director, Resources (Delegations reference FS20 and FS21), who may sub-delegate eg. to the Procurement Operational Manager.

(ii) Variations to contracts

10. Variations to contracts include the extension of the contract period or variations to the contract terms and conditions, provided any such variation is within the scope of the procurement. Variations must comply with the Contract Rules and be authorised at the appropriate level, which is dependent upon the type of contract and the value of the variation. Works contracts which are managed by the Council's in-house design and construction team have higher value thresholds, in recognition of the relatively high financial value of works contracts and the assurance provided by involvement of the Council's professional in-house team.
11. For works contracts managed by the Council's in-house design and construction team, the thresholds are as follows:
 - Variation (or aggregate values of all variations made to the contract) of over £1 million – Cabinet
 - Variation (or aggregate values of all variations made to the contract) of £500,001 to £1 million – Corporate Director or Director
 - Variation (or aggregate values of all variations made to the contract) of £250,001 to £500,000 – Chief Officer
 - Variation (or aggregate values of all variations made to the contract) up to £250, 000 or 25% of contract price, whichever is lower – Operational Manager (Design and Construction) in consultation with Client Officer

For all other variations, the thresholds are as follows:

- Variation (or aggregate values of all variations made to the contract) of over £500,001 – Cabinet
- Variation (or aggregate values of all variations made to the contract) of £250,001 to £500,000 – Corporate Director or Director
- Variation (or aggregate values of all variations made to the contract) of £100,001 to £250,000 – Chief Officer
- Variation ((or aggregate values of all variations made to the contract) of £30,001 to £100,000 – Operational Manager
- Variation (or aggregate values of all variations made to the contract) up to £30,000 or 20% of contract price, whichever is lower – Principal Officer

Transparency / Scrutiny of Decisions

12. Under the current Scheme of Delegations and the Scrutiny Procedure Rules, the executive decisions of the following are published and subject to call-in:
 - Cabinet; and
 - Chief Executive and Corporate Directors and Directors exercising a Corporate Director or a Director level delegation

13. The decisions of the following are not required to be published or subject to call-in:
 - Assistant Directors, Chief Officers & Heads of Service (under the Scheme of Delegations, Section 4C, or under a specific delegation from the Cabinet) – this includes the tender and award of contracts valued up to £1 million (CO3) or any contract matter delegated by Cabinet; and
 - Decisions regarding framework agreements (delegations reference FS20 and FS21) which may have been delegated by the Corporate Director, Resources to, for example, the Procurement Operational Manager, which may be valued up to £5 million.

Property decisions

Background information

1. The Council undertakes a range of property related transactions involving acquisitions and disposals of land, including buildings, or any right concerning land, whether freehold or leasehold or tenancy.
2. Transactions include complex commercial transactions such as St Davids 2, Leckwith Stadium and retail park, International Sports Village. There are also leases for industrial estates and shopping parades. Workshop tenancies, housing developments, affordable housing schemes, district centre leases, market tenancies, community asset transfers, compulsory purchase orders.

Legal requirements

2. The Council has a duty to ensure value for money when acquiring land and property.
3. If the Council sells or leases land or property, there is an obligation to obtain the best price or rent reasonably obtainable. Decisions are made in the same way as acquisitions, by reference to price
4. The Council can sell at an undervalue of up to £2 million (above that Welsh Government consent is needed). There has to be a well being benefit for doing so, which requires a Cabinet decision or a Director decision where the value is less than £1m. Community Asset transfers can be a current example of such disposals.

Investment land

5. The Council holds “investment” land which it acquired for development purposes eg. the Sports Village and New St Mellons. Disposal of such land for a proper purpose is not normally a policy issue, provided the Council is obtaining the best price or rent reasonably obtainable.

Operational land

6. The Council also holds “operational” land and buildings, such as playing fields, school land, depots, offices etc. Declaring such assets as surplus to requirements does normally involve a policy decision. Another service area might have a value for money use for the asset, or a community use might be preferable to a market disposal. A proper consultation process is needed in this respect

7. However, the Council is responsible for a large number of small land transactions, such as lettings on shopping parades and industrial estates, and it is not feasible to have a consultation process on every one of those. As with planning, the system would grind to a halt in the absence of fully delegated decision making for everyday disposals.

Procedure for property transactions

8. The Procedure Rules for the Acquisition and Disposal of Land (contained within Part 4 of the Constitution) set out the procedure to be followed for all acquisitions and disposals of land (with the exceptions set out in those Rules). The Rules require a qualified valuer's report in support of all acquisitions.

Decision making

9. Under the current Scheme of Delegations, property decisions may be taken, dependent on the value of the transaction, by the following:

- Cabinet – over £5 million
- Chief Executive, Corporate Directors and Directors (may not be delegated) – up to £5 million
- **Corporate Director, Resources** can delegate disposals of up to £1 million
- Strategic Estates Officer – smaller transactions.

10. However, if the price is outside of the budgetary framework, the decision requires the approval of full Council.

11. For disposals of operational land there are further provisions, namely:

- (i) Cabinet approval is required if the proposed disposal involves the closure of any facility providing public services (eg. libraries, leisure centres or day centres) – Cabinet's reserved power 42; and
- (ii) ward Members (and other Council service areas) must be consulted before the land can be declared as surplus to Council requirements and disposed under the delegations listed in paragraph 9 above, and if a ward Member objection is received, then the decision must be referred to the Cabinet (delegation reference FS52).

Transparency / Scrutiny of Decisions

12. Under the current Scheme of Delegations and the Scrutiny Procedure Rules, the executive decisions of the following are published and subject to call-in:

- Cabinet; and
- Chief Executive, and Corporate Directors and Directors when exercising a Corporate Director or a Director level delegation.

13. The following decisions are not required to be published or subject to call-in:

Comment [KA]: Note – reallocation of responsibility for Estates to Director for Economic Development

- Decisions on property disposals valued up to £1 million which have been delegated by the Corporate Director, Resources to the Strategic Estates Manager