

<b>Committee(s)</b>	<b>Date</b>
Finance Committee	25 July 2017
Port Health and Environmental Services Committee	16 January 2018
<b>Subject:</b> Annual Waivers Report 2016/17	<b>Public</b>
<b>Report of:</b> The Chamberlain	<b>For Decision</b>
<b>Report author:</b> Chris Bell, Commercial Director, Chamberlain's	

### **Summary**

A waiver is a document that is used to seek approval not to follow the Corporation's standard competitive procurement processes.

The report provides Members a summary of statistics for waivers processed during 2016/17 with the highlight being that there is continued reduction in their use. The report explains the accepted rationales for granting a waiver and explains the risks associated with waivers and in particular retrospective waivers which are:

1. No Due Diligence is completed on the suitability of the supplier
2. Appointment of a supplier using a waiver can lead to 'Reputational' risks
3. That the Corporation does not achieve value for money through competition
4. Health and safety assessments of the supplier are incomplete
5. The Corporation could be taken to court for breach of the UK Public Contract Regulations and the EU Treaty principles

### **Recommendation(s)**

#### **Members are asked to note for information:**

- Note the positive reduction in the number of waivers processed during the last financial year from 830 down to 388.
- Note the value of waivers processed for 2016/17 was £10m.
- Note the risks associated with approving waivers, in particular retrospective waivers which we wish to eradicate during 2017-18.
- The need to consider waiver requests presented to Spending Committees in light of the risks highlighted and to ensure that prior to approval that the waiver is the only viable route to procure a contract.

#### **Members are to approve the following recommendation:**

- That this report is circulated to all Spend Committees for information and training purposes.

### **Main Report**

#### **Background**

1. A waiver is a document that is used to seek approval not to follow the Corporation's standard competitive procurement processes. Under rule 25 of the Procurement Code (the Code) waivers may be granted in exceptional

circumstances provided the appropriate authorisation has been received. These exceptional circumstances are:

- A. Sole supplier** - where it can be demonstrated that there is only one supplier in the market who can provide the required goods, services or supplies. It is anticipated that this will apply to a very limited number of circumstances, for example whereby the parts required are only manufactured by one supplier.
- B. Order outside of a corporate contract** - A waiver may be permitted to allow a purchase outside of the Corporate Contract where we can demonstrate the Corporate Contract supplier has been given an opportunity to review the requirements and the Corporate Contract cannot meet the requirements for the goods, suppliers or services due to their specialist nature.
- C. Extension to contract beyond expiry term** - A waiver may be permitted to allow a short term extension to a contract. Where an unplanned extension is requested the officer must demonstrate that there is a risk to the City e.g. potential gap in service provision; e.g. adding value by combining the contract with another upcoming opportunity.
- D. Urgency due to health and safety risks** - A waiver may be granted if an unforeseeable event which requires prompt (urgent) action to mitigate a health and safety high risk.
- E. Urgency due to security risks** - A waiver may be granted in an unforeseeable event which requires prompt (urgent) action to prevent a security risk. Such requests will be verified by for example the Security Strategy Board or the Head of Intelligence, CoL Police.

### **Retrospective Waivers**

2. A retrospective waiver is a non-compliant purchase that has not been managed by City Procurement; has not followed our Procurement Code or Standing Orders; and carries may in breach the Public Contract Regulations 2015. In such circumstances, the officer has received goods, services or works directly from the supplier and a compliant procurement exercise has not been undertaken. A waiver to the Corporation's procurement code has not been sought and approved from the chief officer or officer with delegated authority (for waivers under £50k) or from the relevant spend committee (for waivers over £50k).
3. Such officer actions are in breach of the Corporation's Procurement Code. Therefore in order to pay the supplier through the Corporation's finance system, a retrospective waiver needs to be attached to the requisition in order for the Corporation to pay its contractual obligations.
4. Officers are in breach of the Corporation's Procurement Code if they proceed with a purchase with the intention of applying for a waiver retrospectively. City Procurement must be contacted prior to the placement of any order. Therefore a retrospective waiver will be noted and reported as a breach of the Corporation's Procurement Code rather than approved.
5. Retrospective waivers are a breach of the Procurement Code and as such they may be referred to the Business Enablement team to undertake a

procurement compliance review; Internal Audit; or Human Resources, if there is a perceived risk that misconduct has taken place. Internal Audit will be conducting a corporate wide audit of the '*use of waivers*' which will be reported during 2017.

#### **Risks associated with contracts reported as being a Retrospective Waiver**

6. There are a number of risks associated with contracts reported via a retrospective waiver that Members should be aware of. These include:

- A) **No Due Diligence completed on the suitability of the supplier** - The Corporation risks having entered into a contract with a supplier who has violated mandatory grounds for exclusion within our Procurement Code. These include for example: safeguarding checks, history of fraudulent activity, financial insecurity, historic non-payment of tax etc. Such a waiver means that City Procurement's standard due diligence process has not been followed.
- B) **Reputational risks** - to the Corporation for using public money to purchase goods, services and works from suppliers who do not provide value for money; cause PR concerns, have mandatory or discretionary grounds for exclusion under the Code. Such information may legally need to be released via Freedom of Information requests and subsequently reported in the national press.
- C) **The Corporation does not achieve value for money** - for the goods, services or works purchased. For example, by purchasing directly from the supplier, and not seeking alternative bids, the department will not be able to achieve the best price or the most innovative solution.
- D) **Health and safety risks** - The supplier may have breached health and safety legislation in the past which the Corporation will be unaware of. City Procurement will ensure that for all procurements, where a health and safety risk is identified, that health and safety is addressed in the method statement completed by the supplier.
- E) **Risk of legal challenge the Corporation** - Breaches of the Procurement Code and procurement legislation such as the Public Contracts Regulations 2015 may result in a costly legal challenge for the Corporation on the grounds that competition has been prevented and principles of fairness and transparency have been breached.

#### **Process for getting a waiver approved**

- 7. Waivers with a value at £50,000 or more but less than the Official Journal of the European Union (OJEU) threshold must be approved by the relevant Spending Committee for the Department requesting the waiver.
- 8. Urgent waivers at £50,000 or over but less than the OJEU threshold can alternatively be authorised by the Chamberlain and reported subsequently at Finance Committee.
- 9. Waivers valued below £50,000 must be approved by the departmental Chief Officer or an officer with delegated authority to do so.

10. The Corporation, acting in its capacity as a local, port or police authority must comply with legislation governing public procurement and the requirement to comply with the Public Contracts Regulations 2015 mean that no waiver request with a value above the Official Journal of the European Union (OJEU) threshold can be permitted.
11. All waiver reports must have been reviewed and commented on by the Commercial Director or Assistant Director of Category Management and Sourcing prior to being submitted for decision to ensure appropriate scrutiny has taken place in line with the Procurement Code.

### **2016/17 Waiver Performance – over £50,000**

12. There was a total of 22 waivers of this nature process in the last financial year to the value of £3m compared to 18 (value £2.5m) in 2015/16.
13. The tables provided in Appendix 1 show a breakdown of the number of waivers over £50,000 by department and the total value and the associated reasons given for the waivers.

### **2016/17 Waiver Performance - Under £50,000**

14. The number of under £50k waivers processed has decreased significantly from a total of 812 in 2015/16 to 362 in 2016/17. This illustrates greater education on the Procurement Code, the risks associated with Waivers and proactive leadership from Chief Officers in refusing to progress waivers.
15. The tables provided in Appendix 2 show a breakdown of the number of waivers under £50,000 by department and their total value with the reasons associated for the waivers. There was £7.5m of spend process via sub £50k waivers compared to £7.6m in 2015/16.

### **Conclusion**

16. The last financial year has seen a significant decrease in the total amount of waivers processed which now sits at 0.9% of the total Purchase Orders issued. At a value of circa £10m last year though, it is still provides significant risks to the organisation in evidencing value for money, and in particular with regards retrospective waivers inherent unknown risks due to standard due diligence checks being bypassed.

### **Appendices**

1. Appendix 1 Waiver Performance Tables – Over £50,000
2. Appendix 2 Waiver Performance Tables – under £50,000

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