

Procurement Forums

Tuesday, 21 November 2023
City Finance and Governance
Committee

Strategic Alignment - Enabling Priorities

Program Contact:
Anthony Spartalis, Manager
Finance & Procurement

Public

Approving Officer:
Michael Sedgman - Chief
Operating Officer

EXECUTIVE SUMMARY

At its meeting on 28 March 2023, Council resolved:

That Council:

- 1. Advise on the potential to offer Procurement Forum Presentations, conducted in both English and other languages, to provide information on the procurement process, guidelines, and procedures for the multicultural community and businesses interested in working with City of Adelaide.*
- 2. Ensure transparency and fairness throughout the procurement process, with adequate communication to unsuccessful bidders from diverse cultural backgrounds on the reasons why their bid was not successful.*
- 3. Continue to promote openness, transparency, and fairness in all its dealings with ratepayers and the community, including those from diverse cultural backgrounds.*

This report responds to the decision.

In summary, whilst the intent of the Forums is to be more fair and open, it is possible that such an approach could deliver the opposite, in addition to opening Council to increased costs and risks, both legally and reputationally.

With a view to addressing the requirements of Council's resolution, one possible course of action may be to have the procurement and economic development teams to work together to consider various approaches to ensure potential suppliers, including those from diverse cultural backgrounds, can become more 'tender ready' for procurements undertaken by the City of Adelaide.

RECOMMENDATION

The following recommendation will be presented to Council on 28 November 2023 for consideration

THAT THE CITY FINANCE AND GOVERNANCE COMMITTEE RECOMMENDS TO COUNCIL
THAT COUNCIL

1. Notes the report on the potential to offer multi lingual Procurement Forum Presentations.
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IMPLICATIONS AND FINANCIALS

City of Adelaide 2020-2024 Strategic Plan	Strategic Alignment – Enabling Priorities
Policy	Not as a result of this report
Consultation	Not as a result of this report
Resource	Not as a result of this report
Risk / Legal / Legislative	Not as a result of this report
Opportunities	Engagement with potential suppliers to assist them in becoming “tender ready”, potentially increasing the number of submissions for procurements which may lead to improved procurement outcomes.
23/24 Budget Allocation	Not as a result of this report
Proposed 24/25 Budget Allocation	Not as a result of this report
Life of Project, Service, Initiative or (Expectancy of) Asset	Not as a result of this report
23/24 Budget Reconsideration (if applicable)	Not as a result of this report
Ongoing Costs (eg maintenance cost)	Not as a result of this report
Other Funding Sources	Not as a result of this report

DISCUSSION

Background

1. At its Meeting held on 28 March 2023, Council resolved:

That Council:

1. *Advise on the potential to offer Procurement Forum Presentations, conducted in both English and other languages, to provide information on the procurement process, guidelines, and procedures for the multicultural community and businesses interested in working with City of Adelaide.*
 2. *Ensure transparency and fairness throughout the procurement process, with adequate communication to unsuccessful bidders from diverse cultural backgrounds on the reasons why their bid was not successful.*
 3. *Continue to promote openness, transparency, and fairness in all its dealings with ratepayers and the community, including those from diverse cultural backgrounds.*
2. It is understood that the Motion endorsed by Council was predicated on a report that the City of Brisbane undertook a procurement forum in languages other than English.
 3. In reaching out to the City of Brisbane, it was found that the City of Brisbane did not hold the forum. Rather, it was conducted by a ward councillor who, as advised by the City of Brisbane, funded the forum from their own resources.
 4. In the first instance, this matter has been considered from the position of what the City of Adelaide currently has in place, from a policy, process and engagement perspective.

Procurement Policy, Guidelines and Processes

5. The City of Adelaide's (CoA) procurement activities are governed by 4 key policies and guidelines:
 - 5.1 **Procurement Policy:** developed in accordance with principles in section 49(a1) of *Local Government Act 1999 (SA)* (the Act) - to develop and maintain procurement policies, practices and procedures directed towards obtaining value for money in the expenditure of public money, **providing for ethical and fair treatment of suppliers**, and ensuring probity, accountability and **transparency** in procurement operations
 - 5.2 **Procurement and Contract Management Operating Guideline** (Link 2 view [here](#)): supports Council Officers through the procurement activity process by providing easy and clear best practice guidance, establishing the processes, roles, responsibilities, authorities, and accountabilities for stakeholders to manage procurement efficiently and effectively.
 - 5.3 **Procure to Pay Operating Guideline:** details controls used to ensure Council funds are wisely spent and drive value for money, detailing processes to be followed to ensure external expenditure is appropriately controlled and the most effective process is used in each instance.
 - 5.4 **Procurement and Contract Approvals Operating Guideline:** provides information regarding approval processes for procurement and contract activities, covering authorisations to commit funds, award Contracts, execute Contracts, make payment or amend Contracts.
6. In addition to the above four documents, a range of various templates and three work instructions provide more detailed processes. The work instructions are in relation to:
 - 6.1 Evaluation
 - 6.2 Financial Viability Checking, and
 - 6.3 Negotiation
7. A primary principle within Council's Procurement Policy (Link 1 view [here](#)) is...

'Providing for ethical and fair treatment of suppliers',
...primarily designed to provide a level playing field for all suppliers.
8. This is achieved through a number of methods outlined in the policy and guidelines.

Engagement with suppliers (by the Procurement Team)

9. To ensure that Council's procurements reach as many prospective suppliers as possible, procurements with an open market approach are advertised on the SA Tenders and Contracts website (<https://www.tenders.sa.gov.au>) and follow a consistent process.
10. CoA's Procurement Team maintain consistent communications with existing and prospective suppliers throughout the procurement cycle and its related functions. This may occur prior to tender development and release, during the tender process and after the tender process.
 - 10.1 Pre-tender communications is not undertaken by the Procurement team however, Project Managers may, without any commitment, engage with suppliers during the Initiate or Design Phase to help define requirements prior to procuring goods and services.
 - 10.2 Communication during the tender process can include clarifications on technical requirements, notifications of additional specification documents or amendments to specifications documents, extensions to the tender closing date or any other requests for information from prospective suppliers.
 - 10.3 Communication post-tender includes notifying unsuccessful suppliers of procurement outcomes by email and if requested by suppliers, Council representatives meet with, and provide feedback to, the supplier regarding reasons why they were unsuccessful. Other communications and activities relate to contract management practices throughout the term of the contract.



Preliminary Considerations

11. Preliminary considerations on the potential to conduct forums in other languages include:
 - 11.1 Ensuring that fairness and openness is maintained for all members of the community and that no inequity is inadvertently created for some members of the community by offering forums in some, but not all, languages – in effect being closed to some parts of the community when trying to be open.
 - 11.2 Ensuring that the translation of tender documentation and wording (often quite technical) across languages is precise, to maintain fairness and transparency and also to avoid potential misunderstanding.
 - 11.3 Managing expectations and resourcing for the ongoing engagement, or relationship to be facilitated, in other languages.

Key Matters Considered

12. Whilst the proposal is to provide improved openness, transparency and fairness to a broader audience for procurement activities undertaken by City of Adelaide, the following matters were identified as being potentially problematical.
 - 12.1 **Policy around fairness and transparency**
 - 12.1.1 As alluded to above, whilst the intent of offering procurement forums in languages other than English is to provide improved openness, fairness and transparency, it is probable that in doing so the opposite outcome may result through offering the forums in selected languages only. There is the real likelihood this approach may end up excluding more languages, and therefore potential suppliers, than including them, decreasing access and transparency.
 - 12.1.2 In addition, there is the potential for complaints from suppliers whose preferred language has not been chosen or considered for such forums.
 - 12.2 **Cost to promote and engage in activities in other languages**
 - 12.2.1 To be able to provide forums in languages other than English, the CoA will need to engage translators prior to the forums to develop communications, throughout the forums to engage with prospective suppliers and post-forums to respond to queries that may arise.
 - 12.2.2 In addition, holding such forums in languages other than English may set an expectation that engagement activities will also be conducted in a language other than English, adding further cost should translators be required to engage with proponents throughout the entire Procurement Cycle and related processes.
 - 12.2.3 It is difficult to estimate the effort required, and therefore the cost to engage translators, for the above activities.

12.3 Accuracy of messaging through translators

- 12.3.1 Given the technical and legal aspects associated with many procurements, ensuring the accuracy of messaging and documentation is paramount. This poses challenges and may be difficult to achieve through translation.
- 12.3.2 There is also a risk, subject to the accuracy of documentation, of prospective tenderers over or under-quoting if misunderstandings or misinterpretations arise through imprecise translations.
- 12.3.3 Should messaging and documentation be unclear, there is the real likelihood that this could lead to both commercial and/or legal disputes. Should disputes eventuate, where would liability lie? Is it with Council or the proponent? Could this uncertainty end up in a potential costly legal process? For Council and the supplier.
- 12.3.4 Preliminary investigations suggest that translation of agreements and related technical documents could cost on average about \$50 per page (noting translations are generally charged on the number of words in a document and there are a range of different quality translations). When one considers that the average size of agreements and attachments for infrastructure projects is around 100 pages, the cost of translation to be borne by the parties could be about \$5,000 on average per infrastructure procurement. It is important to note that the standard clauses can be translated once however technical specifications are different for each procurement and the length of agreements are subject to complexity. Note that larger and more complex infrastructure procurements can result in up to 500 pages for agreements and related attachments.

12.4 English as the Basis for Contract Law in South Australia

- 12.4.1 Given that South Australian law is governed by English and all contracts are necessarily written in English, any such disputes are also dealt with and tried in English.
- 12.4.2 It is therefore likely that any supplier relying on transactions and contract documentation translated into a language other than English, is likely to be at a disadvantage, with the potential to end up being liable.
- 12.4.3 This contravenes the intent of our policy in maintaining fairness, and goes against the intent of holding the forums in a non-English language in the first place and reducing the financial burden for local businesses.
- 12.4.4 In addition to the potential cost of initial translation and ongoing activities (as per above), the cost to ensure accuracy, through translators, is also difficult to determine. And should legal disputes arise, Council is further exposed to extra unforeseen costs and resourcing.

12.5 Ongoing activities associated with an Agreement

- 12.5.1 Once an agreement is executed the Contract Management phase kicks in requiring constant and regular communications of various means between the supplier and CoA throughout the lifecycle of the project.
- 12.5.2 This raises another set of questions such as, would there be an expectation to conduct such activities bilingually and will project managers be expected to engage with potential suppliers through interpreters and translators.
- 12.5.3 The level of activity will vary depending on the types of projects undertaken and it is again difficult to ascertain the cost associated with such activities.

Opportunities

- 13. Given the intent of the Motion, to seek to reach a greater audience and provide a fairer and more open and transparent process with greater access, the following opportunities were considered.
 - 13.1 **Supplier Forums:** Regular forums to assist suppliers to understand the CoA's procurement and tendering requirements and associated policies, procedures, processes and guidelines so that they can be "tender ready" to give them the best chance of being successful in any tenders they choose to participate in. This simply means looking at ways in which we can assist local and other suppliers to learn and understand, and become more proficient in, our procurement processes to give them an improved chance of success.
 - 13.2 **Publish upcoming procurements:** CoA already publishes upcoming tenders > \$150k on its website. We could consider alternative channels or methods to communicate this more effectively, to ensure the widest possible audience receives this information. For example, we may be able to advertise on different community and social media platforms for greater reach.

- 13.3 **Economic development activities:** In association with the above initiatives, we could expand the role of economic development in the city to engage with and provide support for businesses, making it easier not only for suppliers with English as second language, but for other groups referred to in our policy such as local suppliers, indigenous businesses and social enterprises. The types of engagement and support will need to be developed jointly between the procurement and economic development teams.

Summary

14. Whilst the intent of the Forums is to be more open, transparent and fair, it is possible that such an approach could achieve the opposite, in addition to opening up Council to increased costs and risks, both legally and reputationally.
15. Given that South Australian law is governed by English and our contracts are necessarily written in English, any such disputes are also tried in English. It follows that all prospective suppliers need to be adept at, or have the ability to receive accurate advice, to enable them to operate according to the law of South Australia. In this regard, all prospective suppliers have a level playing field.
16. With a view to addressing the intent of the decision, the procurement and economic development teams could work together to consider approaches to ensure prospective suppliers, including those from diverse cultural backgrounds, can become more 'tender ready' for procurements undertaken by the City of Adelaide.

DATA AND SUPPORTING INFORMATION

Link 1 – Procurement Policy

Link 2 – Procurement and Contract Management Operating Guideline

ATTACHMENTS

Nil

- END OF REPORT -