

Decision Maker: EXECUTIVE AND RESOURCES POLICY DEVELOPMENT AND SCRUTINY COMMITTEE

Date: 7 September 2017

Decision Type: Non-Urgent Non-Executive Non-Key

Title: Expenditure on Consultants 2016/17 and 2017/18

Contact Officer: Claire Martin, Head of Finance
Tel: 020 8313 4286 E-mail: claire.martin@bromley.gov.uk
David Bradshaw, Head of Finance
Tel: 020 8313 4807 E-mail: david.bradshaw@bromley.gov.uk
Tracey Pearson, Chief Accountant
Tel: 020 8313 4323 E-mail: tracey.pearson@bromley.gov.uk

Chief Officer: Peter Turner, Director of Finance

Ward: N/A

1. Reason for report

Members of ER PDS requested a full report on Consultant expenditure be submitted each year. Officers have therefore looked at total expenditure in 2016/17 and expenditure to date for 2017/18 for both Revenue and Capital Budgets.

2. **RECOMMENDATION(S)**

Members to:-

2.1 Note the overall expenditure on Consultants as set out in this report.

2.2 Refer this report onto individual PDS Committees for further consideration

Impact on Vulnerable Adults and Children

1. Summary of Impact: Any issues concerning vulnerable adults and children should be considered within each individual project brief.
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Corporate Policy

1. Policy Status: Not Applicable
 2. BBB Priority: Not Applicable
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Financial

1. Cost of proposal: Not Applicable
 2. Ongoing costs: All one-off expenditure met from allocated budgets
 3. Budget head/performance centre: Consultants
 4. Total current budget for this head: £N/A
 5. Source of funding: Revenue & Capital
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Personnel

1. Number of staff (current and additional): N/A – one-off costs
 2. If from existing staff resources, number of staff hours:
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Legal

1. Legal Requirement: None
 2. Call-in: Not Applicable
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Procurement

1. Summary of Procurement Implications: Consultants should be appointed in accordance with CPRs 8.2 and 8.6. IR35 Tax implications also need to be considered.
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected):
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? Not Applicable
2. Summary of Ward Councillors comments:

3. COMMENTARY

- 3.1 ER PDS members requested information on the Councils expenditure on Consultants be reported each year. To do this officers have looked at the total expenditure in 2016/17 and also the expenditure for this financial year as at the end of June 2017. This work covered both Revenue and Capital expenditure.
- 3.2 The basic reason for the use of consultants is that at times the Council requires that specialised work is undertaken for specific projects. This is particularly valid when consultants are engaged to work on large scale projects. For completeness expenditure on Architects, Engineers, Surveyors and other consultants commissioned to work on Capital Projects have been included as these generally meet the definition of one-off projects. Proposed expenditure on Capital Projects will have been approved by Executive before being included in the Capital Programme.
- 3.3 The Councils Contract Procedure rules sets out the procurement process to be followed when appointing a consultant and there is also guidance available to staff about what needs to be included in the formal agreement when engaging a consultant, which as a minimum needs to confirm the overall cost, project deliverables, clear brief and reporting arrangements. Appendix 1 provides this in more detail.
- 3.4 There is an element of subjectivity as to what constitutes a “consultant” as a number of services could fall within this definition, however it is generally defined as “a person brought into the Council to carry out a specific job” which is not on-going. For the purposes of this report expenditure on medical fees, counsel and legal fees have been excluded as these are considered to be professional fees rather than consultants.
- 3.5 In looking at consultants, members need to be minded that officers will use them to carry out work on the Council’s behalf when:-
- There is no one internally with the relevant skills or experience
 - There is no capacity/resources available to undertake this work
 - Specialist skills are required
- 3.6 It is important when recruiting a consultant that the project brief sets out the reasons for the use of consultant, that officers have consider any alternative options and also to evaluate the effectiveness of the work undertaken by consultants within the authority.
- 3.7 The benefit of employing consultants is that the Council makes a saving in relation to employer National Insurance and pension contribution. Also in employing consultants the Council is under no obligation to pay consultants for days when they are not working for the Council e.g. sickness and holiday and they are only engaged for a specific period of time – however offsetting this is that these staff are often more expensive.
- 3.8 The risk in not using consultants is that the Council would have to recruit a more substantial and specialised workforce at a greater expense, and thus creating an employment relation or a “contract of service with the associated diversity of employment rights including unfair dismissal and redundancy payment rights, etc.
- 3.9 This report provides a detailed breakdown of all costs officers believe are consultants, broken down over Portfolio’s and service areas. This is shown in Appendix 2 (revenue) and Appendix 3 (capital). It also examines the procurement arrangements associated with engaging the consultants as part of that process.

4. IMPACT ON VULNERABLE ADULTS AND CHILDREN

- 4.1 Any issues concerning vulnerable adults and children should be considered within each individual project brief.

5. FINANCIAL IMPLICATIONS

- 5.1 Included in the body of the report.

6. LEGAL IMPLICATIONS

- 6.1 There is a considerable amount of legislation affording specific employment rights such as paid holiday, maternity leave and pay, entitlement to redundancy payments, minimum notice periods and protection from unfair dismissal, to name but a few to employees. In general terms Self-employed individuals consultants, on the other hand, are not entitled to these enhanced statutory rights or protections, because, arguably, they are not employees in the strict legal sense. However, given the distinction between an employee and a worker, in light of the recent high profile cases including the Uber and the Pimlico Plumber cases some self-employed individuals may be classified as workers with legal entitlement to paid holiday, national minimum wage, etc.
- 6.2 In addition to statutory rights, an employer/employee relationship also implies a duty of trust and confidence between the parties concerned and suggests that neither should act in such a way as to undermine it. This notion introduces the idea of reasonableness into the way in which employers treat their employees. But the relationship between an organisation and a self-employed consultant does not have the same implied duties, with the consultant's protection relying largely on the contractual terms in place.
- 6.3 Describing a role as a consultant will not provide a definitive position and as a starting point, there are three key areas that should be evaluated:
- (i) a requirement for personal service
 - (ii) the existence of mutuality of obligation
 - (iii) the level of control that the council has over an individual.
- 6.3.1 **Personal service** - Is the individual personally required to perform services for the company? An employee is someone who is employed under a contract of service, that is, a contract that requires them to personally turn up for work and carry out the duties requested of them. A consultant, on the other hand, is engaged under a contract for services, that is, a contract under which they agree to provide the company with particular services. But, while they are obliged to ensure that these services are provided, they are not necessarily required to carry out the work personally.
- 6.3.2 **Mutuality of obligation** - Are employers obliged to offer individuals work under their agreed contract? Equally, if an employer offers an individual work, are they obliged to accept it? If they are, it could indicate an employment relationship.
- 6.3.3 **Control** - How much control does the employer have over an individual? Who decides what work needs to be done, how it should be done and when?
- 6.4 HMRC uses different, albeit similar, criteria when determining individual's employment status or otherwise. This means that an individual could be considered an employee for tax purposes and yet remains a consultant from an employment perspective. As stated above, the

processes relating to the engagement of consultants is being tightened with the appropriate checks and balances, taking in account the impact of IR35 regulations. These will reduce or eliminate the obvious employment law risks including the accrual of the statutory protection rights set out in para 5.1 above. HR advice should be sought to ensure that each assignment/engagement is not likely to give rise to employment or "contract of services. Ultimately, who is an employee or a worker, or self- employed individual for employment law purposes is a matter for the court to decide.

7. PROCUREMENT IMPLICATIONS

7.1 Consultants should be appointed in line with CPR 8.6 which requires a detailed project brief to be included with specific outcomes identified. Chief Officers are responsible for ensuring that project briefs are in place and that no payments are made until the specific outcomes have been achieved.

8. POLICY IMPLICATIONS

8.1 Consultants may be used to assist officers in meeting the Council’s key priorities as set out in the updated “Building a Better Bromley 2016-18”.

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| Non-Applicable Sections: | Personnel Implications |
| Background Documents: (Access via Contact Officer) | Held in Finance teams |