



Northern Ireland

**Public Services**

Ombudsman

# Investigation Report

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## Investigation of a complaint against Causeway Coast & Glens Borough Council

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**NIPSO Reference: 202001035**

The Northern Ireland Public Services Ombudsman

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## **The Role of the Ombudsman**

The Northern Ireland Public Services Ombudsman (NIPSO) provides a free, independent and impartial service for investigating complaints about public service providers in Northern Ireland.

The role of the Ombudsman is set out in the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act). The Ombudsman can normally only accept a complaint after the complaints process of the public service provider has been exhausted.

The Ombudsman may investigate complaints about maladministration on the part of listed authorities, and on the merits of a decision taken by health and social care bodies, general health care providers and independent providers of health and social care. The purpose of an investigation is to ascertain if the matters alleged in the complaint properly warrant investigation and are in substance true.

Maladministration is not defined in the legislation, but is generally taken to include decisions made following improper consideration, action or inaction; delay; failure to follow procedures or the law; misleading or inaccurate statements; bias; or inadequate record keeping.

The Ombudsman must also consider whether maladministration has resulted in an injustice. Injustice is also not defined in legislation but can include upset, inconvenience, or frustration. A remedy may be recommended where injustice is found as a consequence of the failings identified in a report.

## **Reporting in the Public Interest**

This report is published pursuant to section 44 of the 2016 Act which allows the Ombudsman to publish an investigation report when it is in the public interest to do so.

The Ombudsman has taken into account the interests of the person aggrieved and other persons prior to publishing this report.

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**Case Reference: 202001035**

**Listed Authority: Causeway Coast & Glens Borough Council**

## **SUMMARY**

I received a complaint about how the Causeway Coast and Glens Borough Council (the Council) conducted a procurement exercise in March 2021 for a three-year concessionary licence to trade at site 4, West Bay Car Park, Portrush (the trading site). The complainant who won the licence via online auction, said the Council removed the need to meet published Application Requirements to proceed to the auction, after the application process had started. The complainant said the Council failed to inform her of this change to the selection process. The complainant said she believed the Council's actions disadvantaged her because she paid a higher price than she otherwise should have, to win the concessionary licence.

I obtained all relevant information, including documentation and records from the Council, together with the Council's comments on the issues the complainant raised. I also obtained the application forms of all participants in the online auction.

My investigation found that the Council failed to adhere to the original selection process by removing the Application Requirements after the process had already commenced. I found too, that the Council failed to notify all applicants, including the complainant, of its decision to remove the Application Requirements. I also found the Council failed to restart the procurement exercise afresh and instead continued with and subsequently concluded it, by progressing applicants to the auction who did and did not meet the Application Requirements. I consider these failures to constitute maladministration. On this basis the investigation upheld the complaint.

This maladministration caused the complainant to sustain the injustice of loss of opportunity to have the concessionary licence won as part of a fair process. She also experienced financial loss and the injustice of loss of opportunity to make an informed decision as to how high she wished to bid or whether to participate in the auction in the first place. In addition, I consider the complainant sustained the

injustice of uncertainty, upset and frustration as she lost all confidence in the integrity of the procurement exercise.

I recommended that the Council provides the complainant with a written apology within one month of the date of the final report.

To help prevent future reoccurrence of the maladministration identified in this investigation, I further recommended that the Council:

- (i) Refunds the overpayments made by the complainant to date over and above the licence fee of £7,800 plus VAT per annum and to charge the remainder of the licence period at this amount;
- (ii) Commissions an Independent Review of its approach taken in the procurement exercise for this trading site and that which it undertook for the trading sites listed in its press advert of 21 February 2021. The review should seek to identify and learn from the issues that have emerged from this investigation; and
- (iii) Provides specific training to Council Officers and all relevant staff on conducting public procurement exercises, particularly regarding those which involve auctions.

I am pleased to note the Council accepted my findings and recommendations.

## THE COMPLAINT

1. I received a complaint about the actions of Causeway Coast and Glens Borough Council (the Council) in relation to the conduct of a public procurement exercise for concessionary trading held on 16 March 2021. The procurement, which was decided by online auction, was to secure a licence to trade<sup>1</sup> at a concessionary trading location, site 4 at West Bay Car Park, Portrush (the trading site) for a three-year term from 1 April 2021 to 31 March 2024. The complainant, who won the auction, said the Council amended the Application Requirements for applicants to participate in the auction, during the application process and after she had submitted her application. The amendment regarded the removal of the requirement that to participate in the auction, applicants ought to provide evidence that they own a vehicle for trade at the time of the application process. The complainant also said the Council failed to make her and other applicants aware of this change to the process, who had already submitted their application.
2. The complainant said the Council's removal of the published application requirements enabled applicants to participate in the auction who were otherwise unable to. The complainant said this amendment to the process and the Council's failure to notify her of it, had unfairly disadvantaged her in that it led the complainant to bid more for the concessionary trading site than she otherwise would have needed to.
3. The complainant explained that the underbidder of the auction did not own a vehicle for trading at the time of the auction. Consequently, the complainant said she bid an inflated price as she was unknowingly bidding against an applicant who did not meet the requirements and whom the complainant considered may not have taken the bidding seriously or had a full understanding of the financial undertaking involved.

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<sup>1</sup> The procurement exercise for Lot 4, West Bay Car Park was for a concessionary licence to trade to sell Tea/Coffee and Traybakes.

## Background

4. On 15 February 2021 the Council placed an advert in a local newspaper for an online auction for concessionary traders to bid for a licence to sell on the trading site<sup>2</sup> for a three-year term.<sup>3</sup> In order to apply to participate in the auction, interested parties had to submit a completed application form by 12 March 2021. Section B of the application form outlined details of '*Application Requirements*'<sup>4</sup> which it stated '*must be met*' before an applicant could participate in the auction and which applicants 'MUST provide' evidence, of via original documentation, with their application. These included, inter alia, proof of trading vehicle ownership.
5. The complainant submitted her completed application form ahead of 12 March 2021 deadline. In doing so, she provided documentary evidence of having met the Application Requirements outlined in Section B of the form.
6. On 4 March 2021 the Council decided to remove the above Application Requirements whereby applicants could progress to the online auction without the need to provide proof of trading vehicle ownership.
7. The online auction took place on 16 March 2021. During the auction the complainant said only one other person bid against her when the bidding reached £7,800 and continued to £14,250. The complainant won the auction with a bid of £14,500 and was thereby successful in her tender for the licence to provide sales on the trading site. As a result, the complainant was required to pay the sum of £14,500 plus VAT<sup>5</sup> ('the fee') to the Council per year for the three-year term until 31 March 2024.

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<sup>2</sup> The Council advert invited applications for tender for concessionary trading at 22 listed locations, including the trading site at West Bay Car Park.

<sup>3</sup> The Council advert stated 'interested parties should meet all Council's selection criteria, details of which and application forms can be obtained from [a named Council staff member]'. The advert stated further, 'Successful applications will be required to attend an online auction at a later date'.

<sup>4</sup> The Application Requirements were: (i) Proof of ownership of vehicle/s; (ii) Photograph of the vehicle; (iii) Insurance cover for the vehicle (iv) Environmental Health Registration under Regulation (EC) No 852/2004 of the Hygiene of Foodstuffs Article 6 (2) (Registration) and Annex II Chapter 3 Regulation (EC) No 852/2004 (General Hygiene Requirements).

<sup>5</sup> Value Added Tax which in this case for the complainant was £2,900 per year. Thus the complainant's total licence fee payable for the three-year term was £17,400.

8. Following the auction, the complainant said she found out the person against whom she had been bidding during the latter part of the auction, did not have a trading vehicle under construction or ownership of any such vehicle.  
Subsequently, the complainant said, she learned the Application Requirements for participation in the online auction had been removed during the application process without her knowledge.
9. On 24 March 2021 the complainant raised her concerns to the Council by telephone and again by letter dated 9 April 2021 that some participants in the auction had not met the Application Requirements. The complainant requested evidence that all auction participants had met the requirements. The Council responded stating it decided to authorise parties to participate in the auction on the grounds that if successful and prior to commencing trading, they would be required to provide Council with evidence of having met the requirements. The Council said, *'if any bidders had secured a site... they would have been sent an invoice... and if required, pursued accordingly'*.
10. On 16 August 2021 the complainant wrote to the Council to complain it had changed the selection process during the competition and those who had already applied were not informed. The complainant explained the Council's actions had driven up bids and this unfairly disadvantaged her. The Council responded to the complainant on 16 September 2021 advising it had made an internal operational decision to open the auction to all bidders (with or without a trading vehicle) as this would ensure no discrimination against people wishing to enter the concessionary market. The Council informed the complainant it could not advertise the change due to time constraints. The Council also confirmed it was content the process had been run fairly and the decision was made to ensure best value for the Council's assets.
11. The complainant wrote to the Council a further time on 12 November 2021. She again referred to the amendment as being unfair to those who had met the Application Requirements and that as a result she had been disadvantaged. The Council issued its response to the complainant on 23 December 2021 and again confirmed it had run the process fairly and no one was disadvantaged.



The Council said, 'the *winning bidder would have had to stand over their contract for the site whether they had a trading van or not*'.

12. The remedy the complainant is seeking is for the Council to check the bids made during the auction conducted on 16 March 2021 and to discount those made by participants who did not fulfil the Application Requirements originally stipulated in the application form. Subsequently, the complaint is seeking the Council to amend the annual fee she owes for the trading site, to reflect the last 'legitimate bid' placed by an applicant who did meet the Application Requirements<sup>6</sup>.

### **Issue of complaint**

13. The issue of complaint accepted for investigation was:

**Whether the Council's process for the auction of the concessionary trading site at West Bay Car Park Portrush for the period from 1 April 2021 to 31 March 2024, was appropriate and reasonable.**

## **INVESTIGATION METHODOLOGY**

14. To investigate this complaint, the Investigating Officer obtained from the Council all relevant documentation together with its comments on the issues the complainant raised.

### **Relevant Standards and Guidance**

15. To investigate complaints, I must establish a clear understanding of the standards, both of general application and those which are specific to the circumstances of the case. I also refer to relevant regulatory, professional and statutory guidance.

The general standards are the Ombudsman's Principles<sup>7</sup>:

- The Principles of Good Administration.

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<sup>6</sup> I.E. Participants who had a trading vehicle at the time of application.

<sup>7</sup> These principles were established through the collective experience of the public services ombudsmen affiliated to the Ombudsman Association.

16. The specific standards and guidance referred to are those which applied at the time the events occurred. These governed the exercise of the administrative functions of the authority whose actions are the subject of this complaint.

The specific standards and guidance relevant to this complaint are:

- Department of Finance and Personnel, Northern Ireland Public Procurement Policy, 2014, (NI Public Procurement Policy);
- Causeway Coast and Glens Borough Council, Procurement Policy, March 2021, (Council Procurement Policy); and
- Government Legal Department, The Judge over your shoulder – a guide to good decision-making, 24 October 2022 (Good Decision-making Guide).

17. Relevant sections of the guidance were considered.
18. In investigating a complaint of maladministration, my role is concerned primarily with an examination of the Council's administrative actions. It is not my role to question the merits of a discretionary decision taken unless that decision was attended by maladministration.
19. I did not include all the information obtained in the course of the investigation in this report. However, I am satisfied I took into account everything that I consider to be relevant and important, in reaching my findings.
20. I shared a draft copy of this report with the complainant, the Council and the Council Officer whose actions are the subject of the complaint, to enable them to comment on its factual accuracy and the reasonableness of my proposed findings and recommendations. The complainant, the Council and the Council Officer submitted comments in response. I gave careful consideration to all the comments I received before finalising this report.

## THE INVESTIGATION

### Detail of Complaint

21. The complainant raised concern that the Council removed the Application Requirements originally stipulated in the application form to participate in an online auction to tender for the licence to sell on the trading site. The complainant is dissatisfied that the Council changed the application process in this way, after it had already begun, and the Council failed to notify her and those who had already submitted their application. As a result, the complainant said the application process was unfair and discriminatory against her and those who did meet all the Application Requirements. The complainant also said the Council's actions disadvantaged her and meant she paid more for the trading licence than she otherwise would have needed to.

### Evidence Considered

#### Legislation/Policies/Guidance

22. I considered the following policies and guidance:
- Council Procurement Policy;
  - NI Public Procurement Policy; and
  - Good Decision-making Guide.

Relevant extracts of the policies and guidance were considered.

#### The Council's response to investigation enquiries

23. The Council explained it made the decision to amend the conditions to participate in the auction when it had been '*inundated with requests from people to participate... who did not have a trading trailer / van – but would be responsible to pay for the concessionary pitch if successful*'. The Council said the Infrastructure Officers and the Director of Environmental Services made this '*basic operational decision...*' on 4 March 2021, '*to ensure no discrimination against people wishing to enter concessionary market*'.

24. In relation to the complainant's concerns that the Council's actions were unfair and disadvantaged her, the Council said it *'refutes [the complainant's] allegation that she or any other bidder was disadvantaged'*. The Council said it *'stresses that all successful bidders were obliged [to] and would pay for the site. Any delay on placing a trading unit would be at any bidder's cost'*.
25. The Council said further, it is *'unfair and misleading to create an inaccurate inference that significant [application] criteria was edited. The... fact was – this was a small management decision to enhance the values of the sites... which is at the discretion of the owner of the property / lands'*.
26. In relation to the Council's decision to remove the Application Requirements, the Council said *'it is the Council's statutory obligation... to ensure best value from Council assets and lands'*. The Council said, the Council *'in this instance created as much interest and competitiveness at the auction as possible and thus any additional pool of auction attendees would and is considered a best practice position'*.
27. In relation to the Application Requirements originally in place, the Council said, *'To reduce or limit a pool of auction attendees would only have a negative affect and thus any attempt to reduce a pool to reduce price would be negligent and would not comply with the Northern Ireland Audit Office' (NIAO)*.
28. In relation to the complainant's sought remedy to have her licence fee adjusted to reflect *'the last legitimate bid'*, the Council said this was *'unacceptable given the auction is contract law.'*
29. In relation to the trading licence the complainant secured, the Council said it is *'confident that the site made a reasonable value, given the open competitive process and it would very easily reach this value and most likely a greater value again.'* The Council reiterated it is *'governed by the practices of the NIAO – who... stipulate best value must be obtained'*
30. The Council said further, *'no bidder was forced to attend or bid at the auction.'*

*Bidders attend auctions and bid voluntarily and should have some business acumen on the value of what they are bidding on and its worth to them i.e., a threshold or maximum bid.* In this regard, the Council pointed out that *'The complainant was the previous occupant of the site'* during the 2020 – 2021 year and therefore *'would have been aware of the value of the site.'*

## **Relevant Council records**

### **The complainant's response to draft investigation report**

31. In response to the draft report, the complainant said it *'accurately reflects'* her complaint. The complainant also said, she believes her *'actions to date have been fair and reasonable'* and she *'can only hope that in response to the report, the Council does the same'*.

### **The Council's response to draft investigation report**

32. The Council confirmed it accepts the findings and recommendations of the report. It also said it has *'already put in place measures in relation to future auction processes which are being overseen by a Procurement Officer who was not in post previously'*.

### **The Council Officer's response to the draft investigation report**

33. The Council Officer said the report *'lacks context and rationale'* and *'puts Council Officers in an unfair level of disrepute'*. He said further, the draft report *'disproportionately weights the operational process unfairly and takes no account of the complainant's responsibility at auction'*. In relation to the Council's decision to remove the application requirements, the Council Officer reiterated this was *'to attain best value and not to discriminate against those who did not have a receptacle'*. In relation to re-advertising the auction, the Council Officer said this would have delayed the auction and *'would have caused significant financial losses to the Council as the start date was required for 1 April for business continuity'*.

## **Analysis and Findings**

### *Decision to remove Application Requirements*

34. Having examined the content of the Council's press advert for the trading opportunity, I note it stated, '*interested parties should meet all Council's selection criteria, details of which and application forms can be obtained from [named member of Council staff]*'. The advert stated further, '**Successful applications [my emphasis] will be required to attend an online auction at a later date**'. I am satisfied therefore, that potential applicants were notified from the outset that a preliminary short-listing exercise would take place whereby selection criteria must be met to proceed to the online auction.
35. In addition, having examined the content of the application form, I note Section B of the guidance note contained therein, explicitly states '*Application Requirements... In order to participate in an online auction for the rights to trade... applicants MUST provide... Original documentation with their application*'. Thus, I consider applicants were further reminded that on submitting an application form it would not proceed to the next stage in the process without the Application Requirements being firstly fulfilled.
36. I consider it clear that selection criteria in the form of Application Requirements were in place from the outset and constituted a preliminary short-listing stage of the application process. I do not consider the setting of such selection criteria to be unreasonable. In my view, where such criteria are reasonable and proportionate, they allow the Council to conduct a preliminary assessment of applicants' suitability to take on the concessionary licence. On the other hand, however, if the Council did not wish to use the Application Requirements it ought to have ensured it removed this stage and any reference to it, at the beginning and before the process opened. I am satisfied that the Council did not do so. Instead, the Council acknowledged to both the complainant and this office, it made the decision to allow applicants to proceed to the online auction without the need to meet the Application Requirements. I consider the Council's removal of the Application Requirements in this way, was outwith the process as advertised in the press and described in the application form.
37. Having considered the Council's actions in this regard, I consider it failed to comply with the First Principle of Good Administration which requires a body to

*'get it right'*. This states that public bodies should *'take proper account of established good practice'*. On this occasion the Council failed to adhere to its published process in place at the outset of the application process. In doing so, I consider the Council also failed to fulfil Principle Four which requires a body to *'act fairly and proportionately'*, by *'ensuring decisions are proportionate, appropriate and fair'*. I consider the Council's failure to meet these principles constitutes maladministration. I therefore uphold this element of the complaint.

38. In response to my enquiries, the Council said it made *'a basic operational decision'* to remove the need to meet the Application Requirements, to create *'as much interest and competitiveness at the auction as possible'*. The Council said it took this course of action in response to having received a *'plethora of interest'* about the opportunity and it did not want to discriminate against people who wanted to break into the concessionary trading market. The Council said this was in line with its *'statutory obligation to achieve best value for Council assets'* and *'in line with its Corporate Strategy'*. I note the Council Officer reiterated these points, in his response to the draft report.
39. I note the concept of best value for money forms a fundamental tenet of public procurement policy. However, so too are the 12 Guiding Principles within the Northern Ireland Procurement Policy, which govern public procurement's administration. I note the NI Public Procurement Policy provides that these Guiding Principles *'reflect the statutory obligations of opportunity and sustainability'*. These principles are also outlined in the Council's Procurement Policy<sup>8</sup> and include the principle of *'fair-dealing'*. I am satisfied that the Council's obligation to achieve best value for money neither negates nor should be at the expense of the statutory obligation to ensure fair-dealing whereby *'suppliers are treated fairly'*. I note this is explicitly stated in the Council's Procurement Policy. Page 11 of which states that while Council's procurement activity should achieve *'value for money, meet business need and comply with the law...[to] achieve these outcomes procurement activity undertaken by [the Council] should (i) be fair'*.<sup>9</sup>

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<sup>8</sup> The Council's Procurement Policy, principle of transparency at page 8.

<sup>9</sup> The Council's Procurement Policy, principle of transparency at page 11.

40. In response to enquiries made by this office, I also note the Council's contention that it made the decision to remove the Application Requirements because it did not wish '*to discriminate against business start ups*'. The Council Officer reiterated this point in his response to the draft report. However, as stated above at paragraph 37, I do not consider the setting of selection criteria to be unreasonable and subsequently applied in this case. In any event., I note that neither the Council's published press advert nor the guidance information within the application form, stated it may waive the selection criteria in the event of huge interest or if it deemed it appropriate to do so.
41. Furthermore, I note that no documented record of the Council's decision to depart from the Application Requirements has been provided to my office. I am therefore unable to identify any contemporaneous evidence that supports the Council's reported rationale for its decision to remove the need to meet the Application Requirements after the procurement process had begun.
42. I consider the Council's failure to document both its decision and reasons to remove the need to meet Application Requirements, to be a failure to fulfil the Third Principle of Good Administration. The Third Principle requires public bodies to '*be open and accountable*' by stating the criteria for decision making and giving reasons for decisions. Public bodies are also required to be open and transparent when accounting for their decisions. In my view this includes providing clear reasoning and evidence for decisions and being clear about the rationale and considerations used.
43. The Council did not provide any contemporaneous documented reason for its decision at the time, for removing the need to fulfil the Application Requirements. I consider the failure to maintain accurate and contemporaneous records of the reasons for key decisions, impedes the thorough and independent assessment of the 'process of reasoning by which issues were resolved and how various factors were weighted'.<sup>10</sup> Moreover, good practice requires that the reasons for important decisions are recorded to

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<sup>10</sup> Good Decision-making Guide, page 17, Giving reasons for your decision.



ensure no ambiguity or misunderstanding could arise in the future. I consider the Council's failure to record its reasons for its decision, to constitute maladministration.

*Failure to notify the complainant*

44. Having examined the available documentation, I am satisfied the Council did not notify the complainant or the wider public of its decision to allow applicants to proceed to auction having not firstly met the Application Requirements. I am critical of the Council in this regard. One of the key guiding principles governing public procurement is transparency, whereby public bodies are required to *'ensure there is openness and clarity in procurement policy and its delivery.'*<sup>11</sup> I consider that in making such a modification to the selection process, it was incumbent on the Council to act openly and transparently by restarting the process afresh and placing a new and updated advert in the press to advise of this change to the original application process. I note the Council failed to do so. Instead, and unknowingly to the complainant, the Council proceeded with the procurement exercise and allowed participants to take part in the auction who both did and did not meet the application criteria.
45. Having considered the Council's actions in this regard, I consider it failed to comply with the Third Principle of Good Administration which requires public bodies to be *'open and clear about policies and procedures'*, and ensuring that *'information... is clear, accurate and complete'*. In addition, the Fourth Principle requires public bodies to *'act fairly and proportionately'* by *'dealing with people consistently'* and *'ensuring that decisions and actions are proportionate, appropriate and fair'*. I consider the Council failed to comply with these principles, a failure which I am satisfied constitutes maladministration. I therefore uphold this element of the complaint.
46. I note the Council Officer's comments in response to the draft report, that to readvertise the auction in the press, would have postponed the auction and caused financial loss to the Council. I note the Council Officer also said it *'would have caused significant financial loss and business continuity to traders'*

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<sup>11</sup> Northern Ireland Public Procurement Policy at page 5.

as the start date for trading was 1 April. While I note these comments from the Council Officer, I am satisfied that it was the Council's responsibility to consider these matters when making its decision to amend the application process.

47. It is my view that the failures I identified above, resulted in the injustice of loss of opportunity for the complainant to have the concessionary licence won as part of a fair process. I am satisfied that the complainant also experienced the injustice of loss of opportunity to make an informed decision as to how high she wished to bid or whether to participate in the auction in the first place. In addition, I consider the complainant suffered the injustice of uncertainty, upset and frustration as she understandably lost all confidence in the integrity of the procurement exercise.

*The complainant's winning bid*

48. The complainant raised particular concern that the Council's actions to progress applicants to the auction without the need to meet the Application Requirements, resulted in her having to bid a higher price to win the concessionary licence. In my view, the complainant had a reasonable expectation that the Council would properly consider all applications in accordance with its published criteria and that thereby, participants bidding in the auction had met those criteria. Thus, I consider this would have allowed the complainant to participate in the auction, with understandable confidence that she did so along with other applicants who had been determined meet the same minimum qualifications as she did. I note the Council Officer's view raised in response to the draft report, that the *'operational process is disproportionately weight[ed]'* and the complainant's responsibility and the context of an auction also ought to be considered in the report. However, irrespective of the responsibilities the complainant had when partaking in the auction, I am satisfied that the Council had a first and foremost overriding onus to ensure the procurement exercise was conducted properly and fairly.
49. My review of the available documentation indicates there were five participants in the online auction. Having examined the application forms of all the auction participants, I note four of them (including the complainant) provided details

pertaining to and indicating trading vehicle ownership. However, the underbidder did not. While three of the application forms fell short of providing accompanying documentary evidence of ownership, I am satisfied that the requirement to do so had been removed by Council during the process. Notwithstanding, I am satisfied that the details provided therein provide sufficient evidence in so far as vehicle registration number, business name and affirmative self-declaration of having insurance, to conclude that, had the Application Requirements been strictly adhered to, such documents would have been provided at the time of application.

50. Having examined the bidding sequence of the auction I note that when the bidding reached £7,800, only the complainant and underbidder continued bidding until the winning bid of £14,500.<sup>12</sup> I am unable to determine the extent to which the complainant's bidding would have changed had she known of the possibility some of the auction participants may not have met the Application Requirements. I note too, that had the complainant been informed of this, and still chose to take part in the auction, she would not have known who did or did not meet the requirements. Notwithstanding, in my view, the bidding sequence demonstrates bids were driven up by the underbidder's participation, who I am satisfied did not meet the Application Requirements.
51. Accordingly, I consider the Council followed a flawed process by allowing a hybrid of applicants to participate in the auction who both did and did not meet the Application Requirements. In so doing, I consider the Council failed to comply with the First Principle of Good Administration which requires public bodies to '*get it right*' by ensuring they '*take proper account of established good practice*'. I consider this failure to constitute maladministration. I therefore uphold this element of the complaint.

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<sup>12</sup> The bidding sequence from £7,800 was as follows: Complainant £8,000; Underbidder £8,200; Complainant £8,400; Underbidder £8,600; Complainant £8,800; Underbidder £9,000; Complainant £9,200; Underbidder £9,400; Complainant £9,600, Underbidder £9,800; Complainant £10,000; Underbidder £10,250; Complainant £10,500, Underbidder £10,750, Complainant £11,000. Underbidder £11,250, Complainant £11,5000, Underbidder £11,750, Complainant £12,000; Underbidder £12,250. Complainant £12,500; Underbidder £12,750; Complainant £13,000; Underbidder £13,250; Complainant £13,5000, Underbidder £13,750; Complainant £14,000; Underbidder £14,250; Complainant £14500.

52. As a result of this failure, I consider the complainant experienced financial loss. As a consequence of the Council's actions in operating a flawed process, I consider the complainant bid higher to win the auction than she otherwise would have needed to, had the Council adhered to the Application Requirements.
53. In her complaint to my office, the complainant raised concern that the underbidder told her the Council advised the underbidder to state in their application form they had a vehicle under construction. Having reviewed the underbidder's form I note it states '*Trailer is in construction process*'. I also note in respect of the question relating to trading vehicle registration number, the underbidder provided a number which they stated was for their '*own personal car*'. I consider any suggestion that the Council may have advised an individual to record in their application form they had a trailer under construction, as a deliberate and concerted means to circumvent the Application Requirements, to be concerning. While there is no evidence this took place on this occasion, I would consider any such action to fall far short of good practice.

## **CONCLUSION**

54. I received a complaint about the actions of the Council in relation to the conduct of a procurement exercise for the concessionary licence to occupy the trading site for a three-year term. The complainant said the Council removed the need to meet published Application Requirements after the application process had started and she was not informed of this. As a result, the complainant said she paid a higher price than she otherwise should have, to win the concessionary licence.
55. I made findings of maladministration in relation to:
- The Council's failure to adhere to the original selection process by removing the Application Requirements after the process had already commenced;
  - The Council's failure to notify all applicants, including the complainant, of its decision to remove the Application Requirements;

- The Council's course of action to continue with and subsequently conclude the procurement exercise which was flawed, by progressing applicants to the auction who did and did not meet the Application Requirements.

56. I am satisfied that the maladministration identified caused the complainant to experience financial loss and the injustice of loss of opportunity to have the concessionary licence won as part of a fair process. The complainant also experienced the injustice of loss of opportunity to make an informed decision as to how high she wished to bid or whether to participate in the auction in the first place. In addition, I consider the complainant suffered the injustice of uncertainty, upset and frustration as she lost all confidence in the integrity of the procurement exercise.

### **Recommendations**

57. I recommend that the Council provides the complainant with a written apology in accordance with NIPSO 'Guidance on issuing an apology' (June 2016), for the injustice caused as a result of the maladministration identified (within **one month** of the date of the final version of this report).

58. To help prevent future reoccurrences of the failings identified in this investigation, I further recommend the Council:

- (i) Refunds the overpayments made by the complainant to date over and above the licence fee of £7,800 plus VAT per annum and to charge the remainder of the licence period at this amount;
- (ii) Commissions an Independent Review of its approach taken in the procurement exercise for this trading site and that which it undertook for the trading sites listed in its press advert of 21 February 2021. The review should seek to identify and learn from the issues that have emerged from this investigation; and

(iii) Provides specific training to Council Officers and all relevant staff on conducting public procurement exercises, particularly regarding those which involve auctions.

59. The Council should provide me with its proposal regarding recommendation (i) in response to the draft report within **one month**.

60. I further recommend that the Council implements an action plan to incorporate recommendations (ii) and (iii) and should provide me with an update within **three months** of the date of my final report. That action plan should be supported by evidence to confirm that appropriate action has been taken (including, where appropriate, records of any relevant meetings, training records and/or self-declaration forms which indicate that staff have read and understood any related policies).

**MARGARET KELLY**

**Ombudsman**

**26 June 2023**

## PRINCIPLES OF GOOD ADMINISTRATION

Good administration by public service providers means:

### 1. Getting it right

- Acting in accordance with the law and with regard for the rights of those concerned.
- Acting in accordance with the public body's policy and guidance (published or internal).
- Taking proper account of established good practice.
- Providing effective services, using appropriately trained and competent staff.
- Taking reasonable decisions, based on all relevant considerations.

### 2. Being customer focused

- Ensuring people can access services easily.
- Informing customers what they can expect and what the public body expects of them.
- Keeping to its commitments, including any published service standards.
- Dealing with people helpfully, promptly and sensitively, bearing in mind their individual circumstances
- Responding to customers' needs flexibly, including, where appropriate, co-ordinating a response with other service providers.

### 3. Being open and accountable

- Being open and clear about policies and procedures and ensuring that information, and any advice provided, is clear, accurate and complete.
- Stating its criteria for decision making and giving reasons for decisions
- Handling information properly and appropriately.
- Keeping proper and appropriate records.
- Taking responsibility for its actions.

#### **4. Acting fairly and proportionately**

- Treating people impartially, with respect and courtesy.
- Treating people without unlawful discrimination or prejudice, and ensuring no conflict of interests.
- Dealing with people and issues objectively and consistently.
- Ensuring that decisions and actions are proportionate, appropriate and fair.

#### **5. Putting things right**

- Acknowledging mistakes and apologising where appropriate.
- Putting mistakes right quickly and effectively.
- Providing clear and timely information on how and when to appeal or complain.
- Operating an effective complaints procedure, which includes offering a fair and appropriate remedy when a complaint is upheld.

#### **6. Seeking continuous improvement**

- Reviewing policies and procedures regularly to ensure they are effective.
- Asking for feedback and using it to improve services and performance.
- Ensuring that the public body learns lessons from complaints and uses these to improve services and performance.



# PRINCIPLES OF GOOD COMPLAINT HANDLING

**Good complaint handling by public bodies means:**

## **Getting it right**

- Acting in accordance with the law and relevant guidance, and with regard for the rights of those concerned.
- Ensuring that those at the top of the public body provide leadership to support good complaint management and develop an organisational culture that values complaints.
- Having clear governance arrangements, which set out roles and responsibilities, and ensure lessons are learnt from complaints.
- Including complaint management as an integral part of service design.
- Ensuring that staff are equipped and empowered to act decisively to resolve complaints.
- Focusing on the outcomes for the complainant and the public body.
- Signposting to the next stage of the complaints procedure, in the right way and at the right time.

## **Being customer focused**

- Having clear and simple procedures.
- Ensuring that complainants can easily access the service dealing with complaints, and informing them about advice and advocacy services where appropriate.
- Dealing with complainants promptly and sensitively, bearing in mind their individual circumstances.
- Listening to complainants to understand the complaint and the outcome they are seeking.
- Responding flexibly, including co-ordinating responses with any other bodies involved in the same complaint, where appropriate.

## **Being open and accountable**

- Publishing clear, accurate and complete information about how to complain, and how and when to take complaints further.
- Publishing service standards for handling complaints.

- Providing honest, evidence-based explanations and giving reasons for decisions.
- Keeping full and accurate records.

### **Acting fairly and proportionately**

- Treating the complainant impartially, and without unlawful discrimination or prejudice.
- Ensuring that complaints are investigated thoroughly and fairly to establish the facts of the case.
- Ensuring that decisions are proportionate, appropriate and fair.
- Ensuring that complaints are reviewed by someone not involved in the events leading to the complaint.
- Acting fairly towards staff complained about as well as towards complainants.

### **Putting things right**

- Acknowledging mistakes and apologising where appropriate.
- Providing prompt, appropriate and proportionate remedies.
- Considering all the relevant factors of the case when offering remedies.
- Taking account of any injustice or hardship that results from pursuing the complaint as well as from the original dispute.

### **Seeking continuous improvement**

- Using all feedback and the lessons learnt from complaints to improve service design and delivery.
- Having systems in place to record, analyse and report on the learning from complaints.
- Regularly reviewing the lessons to be learnt from complaints.
- Where appropriate, telling the complainant about the lessons learnt and changes made to services, guidance or policy.