

Decision Maker: **CONTRACTS SUB-COMMITTEE**

Date: **22nd June 2016**

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

Title: **CHANGES TO CONTRACT PROCEDURE RULES**

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Ward: N/A

1. Reason for report

- 1.1 The consideration of the necessary amendments to Contract Procedure Rules and Associated Guidance and Practice Notes to enable improved management and member scrutiny of Contract Waivers and Exemptions and reflect the Councils' revised Commissioning arrangements.

2. **RECOMMENDATION**

The Sub-Committee is invited to comment on the draft proposed changes to Contract Procedure Rules.

Corporate Policy

1. Policy Status: Existing Policy :
 2. BBB Priority: Excellent Council :
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Financial

1. Cost of proposal: No Cost :
 2. Ongoing costs: Not Applicable:
 3. Budget head/performance centre: Not Applicable
 4. Total current budget for this head: Not Applicable
 5. Source of funding: Not Applicable
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Staff

1. Number of staff (current and additional): Not Applicable
 2. If from existing staff resources, number of staff hours: Not Applicable
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Legal

1. Legal Requirement: Statutory Requirement Non-Statutory - Government Guidance None:
Further Details
 2. Call-in: Not Applicable: This report does not involve an executive decision
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): Not Applicable
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Ward Councillor Views

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

3. COMMENTARY

- 3.1 In recent months members and officers have expressed considerable concern at the use being made of the current arrangements identified within the Council's Contract Procedures Rules, when insufficient time is being allowed for the consideration of any alternative action, for example retendering arrangements instead of the use of a contract extension or other Waiver activity.
- 3.2 While there needs to be a balance between the proper use of delegated authority and the generation of additional reporting requirements, it is clear that in many cases the current consideration, around the use of extension provisions within contracts, results from the lack of timely action within service areas, of the alternatives available to them.
- 3.3 There is also a need to amend Contract Procedure Rules to reflect the New Structures being put in place around the Council's management arrangements and the creation of a post (Director of Commissioning) with responsibility to overview procurement and commissioning arrangements around service provision.
- 3.4 These proposed amendments seek to provide for the right level of member and management scrutiny of intended actions, while also providing the necessary degree of flexibility in contract management arrangements.
- 3.5 It should be noted that any amendments to Contract Procedure Rules, which are over- viewed by Audit Sub-Committee, will require agreement by the Executive or the Council.
- 3.6 There are also a number of associated Guidance & Practice Notes, together with Template Documents, which cover elements of the current requirements which will need to be amended to reflect any agreed changes (i.e. Corporate Procurement Practice Note – Exemptions and Waiver Requirements; Formal Reporting Requirements on Commissioning Activity; Approval of Variations an Extensions; various Waiver Activities and Gate Report Templates and Guidance Notes).
- 3.7 The draft proposed Amendments to Contract Procedure Rules are attached in Appendix A. (To provide context the proposed amendments are inserted in to the current Contract Procedure Rules.)

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|---|----------------------------------|
| Non-Applicable Sections: | Policy/Financial/Legal/Personnel |
| Background Documents: (Access via Contact Officer) | None |

Add to existing Preamble - Introduction to CPR's - "...Director of Commission..." in final paragraph.

Add to existing 1.3 (and renumber 1.3.1) – "... and Director of Commissioning..."

New CPR 1.3.2 – "Where it is proposed to change, amend or extinguish an element of service delivery, either in total or part, and where the estimated value of such change has an estimated value of £100k and above; or where there is a disproportionate impact on other areas of the Councils services. The Director of Commissioning will be consulted on the proposed change, including the consideration of the service business case and associated management reports, at least 3 months prior to the intended implementation."

Add to existing 1.4 – "... and Director of Commissioning..."

Add to existing CPR 2.2.1 – "...and above, and complete the Contract Summary Document, in the details...."

Add new bullet point to CPR 2.2.2 – "Ensure the timely consideration of Contracts and associated actions identified and recorded in the Contract Register and Contract Summary Documents"

Add to existing 5.1 final Bullet point – "... Director of Commissioning..."

Add to existing CPR 5.3 – "... Director of Commissioning..."

New CPR 5.5 – Where the estimated value of the intended arrangement is £500k and above, the Councils Commissioning Board shall receive a copy of the draft Gate Report, prior to its submission to the relevant Portfolio Holder or Executive as required by CPR 5.3 and 5.4.

Add to existing CPR 7.4.1 – "...Director of Commissioning..."

Add to existing CPR 8.3 – "... Director of Commissioning..."

Add to existing CPR 8.4 – "... Director of Commissioning..."

Note CPR 8.5.4 is being amended to reflect Consultants Tax position.

Add to existing CPR 9.1 – Third Bullet point – "Must Consult with the Director of Commissioning and seek advice from....."

Add to Existing CPR 13.1 - action box 2-4 "... Director of Commissioning..."

Add to existing CPR13.4 – "... *Director of Commissioning...*" and "... make use of this permissible extension providing, (a) there is at least six months left on the existing contract term and (b) it is notified to the Audit Sub committee...."

Add to Existing CPR 15.5 - "...Director of Commissioning.."

Existing CPR 16.6 add "...Where a report is required to be submitted to the Portfolio Holder or Executive, under the requirements of this Clause, the Director of Commissioning shall be given an opportunity to review the report prior to its submission to Members."

Add to Existing CPR 23.7.4 add "...Director of Commissioning..."

Add to **Definitions** “..Corporate and Service Contract register, includes the required **Contract Summary Information** ...”

Consequential Revisions to Drafting of CPR's

Preamble - Various Best Practice Guidance Notes and associated processes can be found on the Council's Intranet Site in the Procurement element of the "Manager Toolkit". These complement these Procedural Rules and have been prepared to assist those involved in the *Procurement* process to identify and use best practice. The practices identified should be used by those involved in contracting processes and arrangements unless an alternative course of action has been agreed by the **Head of Procurement** in consultation with the **Director of Corporate Services** and **Director of Commissioning** as necessary. In any case the requirements set out in these *Contract Procedural Rules* must be followed unless a general or specific derogation has been agreed by the Council.

1.3.1 The formal advice of the **Director of Corporate Services**, **Director of Commissioning** and the **Director of Finance** (or their **nominees**) must be sought for the following contracts:

- Where the *Total Value* exceeds **£100,000**;
- Those involving leasing arrangements;
- Where it is proposed to use a supplier's own terms;
- Those involving the purchase of application software with a *Total Value* of more than **£50,000**;
- Involve the placement of a *Contract* with another *Public Sector Organisation*, other than through a *Framework Agreement*, authorised as required in these Contract Procedure Rules;
- Arrangements which require the provision of a formal *Gate Report* to be made to Members during any stage of the contracting process;
- Those that are complex in any other way.

New CPR 1.3.2 – "Where it is proposed to change, amend or extinguish an element of service delivery, either in total or part, and where the estimated value of such change has an estimated value of £100k and above; or where there is a disproportionate impact on other areas of the Council's services. The Director of Commissioning will be consulted on the proposed change, including the consideration of the service business case and associated management reports, at least 3 months prior to the intended implementation."

1.4 The *Public Contract Regulations* (see Annex B of these *Contract Procedure Rules*) provide for five (5) main processes under which *Works, Services and Supplies*, that fall within their provisions can be placed. These are identified as being the (1) "*Open Procedure*"; the (2) "*Restricted Procedure*"; the (3) "*Competitive Dialogue Procedure*"; (4) "*Competitive Procedure with Negotiation*" and (5) the "*Innovation Partnership Procedure*". In addition, but only in very limited circumstances, (6) a "*Negotiated Procedure without Prior Publication*" may be used. However, unless the formal Advice of the **Head of Procurement** has been obtained, and the Agreement of the **Director of Corporate Service**, **the Director of Commissioning** and the **Director of Finance** given, only the first two of these options may otherwise be used.

2.2 Chief Officers

2.2.1 The **Head of Procurement** will maintain a Register of all Contracts with a value of **£200,000** and above. Directorates are required to use the Corporate System to record contracts with an estimated value of **£50,000** and above **and complete the Contract Summary Document**, in the detail it requires and provide for its update on a quarterly basis.

2.2.2 **Chief Officers** must:

- Ensure that their staff comply with Rule 2.1;
 - **Ensure the timely consideration of Contracts and associated actions identified and recorded in the Contract Register and Contract Summary Documents"**
 - Keep a registers of:
 - Contracts completed by signature, rather than by the Council's Seal (see Rule 17.3) and arrange their safekeeping on Council premises;
 - Exemptions recorded under Rule 3.2.
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STEPS PRIOR TO PURCHASE

5.1 The **Officer** must review the intended *Procurement* in a manner commensurate with its complexity, risk and value, taking into account any relevant guidance contained in the *Best Practice Guidance Notes and associated processes included in the Procurement Element of the Managers Toolkit*,

- Taking into account the requirements from any relevant Service review;
- Appraising the need for the expenditure and its priority;
- Defining the objectives of the purchase;
- Assessing the risks associated with the purchase / procurement and how to manage them, including those associated with any required consultation, TUPE, Pensions, Insurance and the Tax implications of any contracting arrangements proposed, together with the Social Value Act Legislation;
- *Undertake Preliminary Market Consultation* with the “Market” and Service Providers as appropriate and to the extent provided for in the Public Contract Regulations (Cl.40), providing this does not distort or compromise the contracting process;
- Considering what *Procurement* method is most likely to achieve the *Procurement* objectives, including internal or external sourcing, partnering, packaging strategy and collaborative *procurement* arrangements with another local authority, government departments, statutory undertakers, public service procurement consortium or Central Purchasing Organisations (CPO’s);
- Contract Length; Consider the appropriate time limits allowed for the completion of the tender process and any statutory requirements that may apply;
- Consulting users, staff and other interested parties, as appropriate, about the proposed *procurement* method, contract standards and performance and user satisfaction monitoring;
- Identify and record the reasons for any “*Lotting*” Strategy to be used;
- Drafting the terms and conditions that are to apply to the proposed contract;
- Consider the approach to be taken to performance and contract management and the reporting arrangements needed to ensure the delivery of the required service.
- Ensuring the correctness of any use of member or delegated approval for the expenditure and that the purchase is in accords with the approved policy framework, *Scheme of Delegation* as set out in the *Constitution*;
- If the purchase is a *Key Decision*, all appropriate steps have been taken
- Setting out these matters in writing if the *Total Value* of the purchase exceeds **£50,000**.
- Ensure that for any Contracts involving the Outsourcing (or Insourcing) of any requirements, the necessary **Commissioning**. Legal, Finance, HR, Pensions, Procurement and IT advice is obtained.

5.2 Where the estimated value of the intended arrangement requires the publication of an *OJEU* and / or *Contract Finder Notice*, the required Procurement Documents must be available at the point of publication.

5.3 Where the estimated value of the intended arrangement is **£500,000** or more the relevant **Portfolio Holder** will be *Formally Consulted* on the intended action and contracting arrangements, having submitted, for consideration, a formal “*Gate Report*”, covering, as appropriate, the matters identified in the Council’s Standard “*Gate Reporting Template*”. Reports produced must identify, after discussion with the *Relevant Officers in Commissioning* Legal, Finance, Human Resources, Procurement and Information Technology, any service and cost implications arising from the proposals being considered.

5.4 Where the value of the intended arrangement is **£1,000,000** or more the **Executive** will be *Formally Consulted* on the intended action and contracting arrangements, having submitted for consideration a formal “*Gate Report*”, covering as appropriate, the matters identified in the Council’s Standard “*Gate Reporting*” Template..

New CPR 5.5 – Where the estimated value of the intended arrangement is £500k and above, the Councils Commissioning Board shall receive a copy of the draft Gate Report, prior to its submission to the relevant Portfolio Holder or Executive as required by CPR 5.3 and 5.4.

7.4 Framework Agreements, Dynamic Purchasing Systems and Electronic Catalogues

7.4.1 The term of a *Framework Agreement*, unless otherwise agreed, by the **Director of Corporate Services**, **Director of Commissioning** and **Director of Finance**, must not exceed four years

8.3 Providing Services to External Purchasers and other Public Sector Organisations

8.3.1 The **Director of Corporate Services**, **Director of Commissioning** and **Director of Finance** must be *Consulted* where contracts to work for organisations other than the authority are contemplated.

8.4 Collaborative and Partnership Arrangements

8.4.1 Collaborative and partnership arrangements are subject to all UK and EU procurement legislation and must follow these *Contract Procedure Rules*. If in doubt, **Officers** must seek the advice of the **Director of Corporate Services**, **Director of Commissioning** and **Head of Procurement**.

Note CPR 8.5.4 is being amended to reflect Consultants Tax position.

9. PRELIMINARY MARKET CONSULTATION

9.1 The **Officer** responsible for the purchase:

- May consult potential suppliers prior to the issue of the *Invitation to Tender* in general terms about the nature, level and standard of the supply, contract packaging and other relevant matters, provided this does not prejudice any potential *Candidate*; but
- Must not seek or accept technical advice on the preparation of an *Invitation to Tender* or *Quotation* from anyone who may have a commercial interest in them, if this may prejudice the equal treatment of all potential *Candidates* or distort competition; and
- Must Consult **with the Director of Commissioning and** seek advice from the **Head of Procurement** where the tender under consideration has an estimated value greater than the relevant EU Threshold and observe the requirements of the Public Contract Regulations Cl.40/41 in the approach taken on such consultation and any subsequent involvement, by those consulted in the tender process.

13. EXEMPTIONS TO THE NEED FOR COMPETITIVE TENDER

13.1 A decision to negotiate with one or more candidates on any arrangements required within the *Procurement* process shall not be made except in compliance with the following and any Public Contract Regulations (see also Rule 3). **Note** - For the purpose of this Rule the establishment of a *Service Level Agreement* is treated as being a negotiated arrangement;

| Estimated Value) | Cost(or | Authorisation Requirement |
|---------------------------------|---------|--|
| £5,000 - £50,000 | | Chief Officer Agreement |
| £50,000 - up to £100,000 | | Chief Officer in agreement with Director of Corporate Services , Director of Commissioning and Director of Finance with a report of the use made of this exemption being made to Audit Sub committee on a bi-annual basis. |

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| <p>£100,000 – up to £1,000,000</p> | <p>Chief Officer in agreement with Director of Corporate Services, Director of Commissioning and Director of Finance and following Approval of the relevant Portfolio Holder, with a report of the use made of this exemption being made to Audit Subcommittee on a bi-annual basis.</p> |
| <p>£1,000,000 and above</p> | <p>Chief Officer in agreement with Director of Corporate Services, Director of Commissioning and Director of Finance and the approval of the Executive or the Council as appropriate.</p> |

13.4 Subject to the satisfactory completion of any required Contract Monitoring Report (see CPR 23), and where the Report produced as required by CPR 5 provides for a discretionary Extension of the Contract for an additional period of time. Providing the Authorising Committee have indicated their agreement at the point of the CPR 5 Report and without the need for further referral, then the relevant Chief Officer may, in agreement with the Director of Corporate Services, Director of Commissioning and Director of Finance, and any other person specified in the authorisation and in Consultation with the Portfolio Holder, make use of this permissible extension providing, (a) there is at least six months left on the existing contract term and (b) it is notified to the Audit Sub committee, as part of the Bi Annual Report produced and identified in this CPR.

15.5 Where post-tender negotiation results in a fundamental change to the specification (or contract terms) the contract must not be awarded but re-tendered unless the Director of Corporate Services, Director of Commissioning and the Director of Finance agree to an alternative course of action.

16.6 Officers may accept, within their relevant financial limit, delegated authority and providing the stipulated degree of separation of duties is maintained, Quotations and Tenders received in respect of proposed contracts, provided they have been sought and evaluated fully in accordance with these Contract Procedure Rules and, in respect of proposed contracts that are expected to exceed £500,000, the approval of the relevant Portfolio Holder has been secured. The awarding of contracts that are expected to exceed £1,000,000 shall be approved by the Executive or the Council, the responsible Officers having submitted for consideration a formal "Gate Report", covering, as appropriate, the matters identified in the Council's Standard "Gate Reporting Template for consideration at Award of Contract. **Where a report is required to be submitted to the Portfolio Holder or Executive, under the requirements of this Clause, the Director of Commissioning shall be given an opportunity to review the report prior to its submission to Members.**"

23.7 Variations and Extensions

23.7.1 No Variation should be issued or Extension agreed unless there is sufficient budgetary provision for each contract or where it is permitted under the Council's Capital Programme Procedures and related responsibilities for financial control of capital projects.

23.7.2 All Variation Orders must be issued promptly and authorised before the work is undertaken. All variations will be contained within agreed limits for each contract and made within the authorised limits determined by the Chief Officer as provided for in Financial Regulations and the Capital Programme Procedures.

23.7.3 Subject to any requirements of Financial Regulations, statutory restrictions and compliance with any provisions of the Public Procurement Regulations (particularly those relating to negotiation; modifications and extensions and any limitations imposed by Clause 72 of the Regulations above), a Chief Officer may authorise the following extension to an existing contact:

- An extension for a particular period provided for within the terms of the contract (but subject to satisfactory outcomes of contract monitoring, such information having been provided to where required in these Rules to the relevant Portfolio Holder and/or Executive); or
- A single extension of the contract by up to one year; or
- An increase in the scope of activities being undertaken.

Providing that where the value of any single and/or all extensions granted is greater than £50,000 the processes and authorisation procedures required shall be the same as those identified in Rule 13 above.

23.7.4 The *Chief Officer* shall consult with the *Head of Procurement* the **Director of Commissioning and the Director of Corporate Services** on any need to issue a *Modification Notice* or take other action required by Cl.72 of the *Public Contract Regulations*.