
Decision Maker: **THE LEADER
WITH PRE-DECISION SCRUTINY FROM EXECUTIVE,
RESOURCES AND CONTRACTS POLICY AND DEVELOPMENT
SCRUTINY COMMITTEE ON 18 NOVEMBER 2020**

Date:

Decision Type: Non-Urgent Executive Key

Title: **COVID 19: PROCUREMENT IMPLICATIONS**

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Chief Officer: Director of Corporate Services

Ward: All Wards

1. Reason for report

- 1.1 On April 24 2020, the Leader granted delegated authority to Chief Officers (in Agreement with the Portfolio Holder as required), for a period of six months, to take suitable alternative procurement action to manage contracts in response to disruption caused by the current and ongoing Covid 19 Public Health measures. During this period, a number of such actions were taken as appropriate.
- 1.2 The ongoing Covid 19 pandemic and associated Public Health measures continue to cause disruption, capacity and sustainability issues for Council staff, our providers and the wider provider market. There is a continued risk that this may adversely affect our ability to undertake successful procurement processes for current or new contracts where a suitably compliant tender process would normally be required.
- 1.3 This report seeks further authorisation from Executive, through the Leader, for delegated authority to Chief Officers to take appropriate procurement action, primarily variations to contracts as required, within the flexibilities available through the Contract Procedure Rules and the Public Contract Regulations 2015, to manage Council contracts effectively. Delegated authority is sought for a further period of six months
- 1.4 As the senior Executive member, the Leader can take all Executive decisions personally, subject to pre-decision scrutiny under the present temporary arrangements agreed by the Urgency Committee and Executive. Whereas the contract standing orders (CPR's) are matters

reserved to full Council, it is permissible for the Leader to vary Executive side delegations and suspend aspects of the rules as proposed in the report.

2. RECOMMENDATION(S)

2.1 Relevant Portfolio Holders and Policy & Development Scrutiny Committees are recommended to note the report and comment as required.

2.2 The Leader, is recommended to:

- i) Grant delegated authority to Chief Officers to take appropriate procurement action (as set out in paragraphs 3.14 to 3.19) as required to effectively manage contracts during the period of disruption caused by the current and ongoing Public Health measures;**
- ii) Agree that the delegated authority to Chief Officers to take appropriate procurement action is subject to Agreement with the Assistant Director Governance & Contracts, the Director of Corporate Services, the Director of Finance and the relevant Portfolio Holder where otherwise a procurement action would normally require a formal decision from the Portfolio Holder or Executive;**
- iii) Agree that the delegated authority to Chief Officers to take appropriate procurement action is in place for period of six months from 1 December 2020 following which it may be extended for a further period at the discretion of Executive or through the Leader.**

Impact on Vulnerable Adults and Children

1. Summary of Impact: N/A
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Corporate Policy

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

1. Cost of proposal: £0
 2. Ongoing costs: None known at this time.
 3. Budget head/performance centre: N/A
 4. Total current budget for this head: £N/A
 5. Source of funding: N/A
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Personnel

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

1. Legal Requirement: Statutory Requirement:
 2. Call-in: Applicable:
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Procurement

1. Summary of Procurement Implications: The report seeks delegated authority to Chief Officers to take appropriate procurement action in relation to the Covid 19 pandemic and current Public Health Measure, as set out in the report
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): N/A
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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 The Covid 19 pandemic and associated Public Health measures have been in place for several months and are set to continue for some time, with some uncertainty as to how long they may continue. The associated disruption may adversely affect the ability of the Council to retender contracts in the usual way, as well as the ability of the provider market to respond. As has been seen, even when the current Public Health measures are relaxed it is likely to take some time before 'business as usual' is regained; or whether measures will be reintroduced.
- 3.2 The capacity of Contract Owners, Commissioners and the Procurement Team may be affected by factors such as:
- Responding to and managing operational issues for both in-house and contracted services arising from the current disruption;
 - Redeployment to special projects;
 - Absence of staff due to isolation and sickness absence.
- 3.3 For providers across all contracts, the capacity of the market to respond to tender opportunities may be affected in the following ways:
- Absence of staff due to isolation and sickness absence;
 - Responding to and managing operational issues for their service;
 - Cash flow issues.
- 3.5 The Cabinet Office Procurement Policy Note (PPN_01_20, previously circulated to Members) provided guidance to contracting authorities of appropriate procurement actions that can be considered to manage contracts during this period, in compliance with the Public Contracting Regulations 2015 (PCR).
- 3.6 Procurement Policy Note (PPN_01_20) covered the following
- The ability of contracting authorities, under Regulation 32 of the PCR to allow Direct Award of contracts due to reasons of extreme urgency or where competition is absent for technical reasons;
 - The ability of contracting authorities to call off from existing compliant frameworks or dynamic purchasing systems;
 - The ability of contracting authorities to use an 'accelerated procedure' for tenders;
 - The ability of contracting authorities to modify a contract during its term (subject to any increase in price not exceeding 50% of the value of the original contract).
- 3.9 In order to effectively manage contracts during the disruption caused by Covid 19, the Council may need to take appropriate procurement actions in line with the Contract Procedure Rules, the PCR and the Cabinet Office guidance. These are most likely to take the form of:
- Direct Award of contracts, without competitive tender, due to reasons of urgency (e.g. sourcing Personal Protective Equipment, commissioning additional Social Care provision);
 - Variations to contracts to support provider cash flow and sustainability where necessary;
 - Alternative procurement action where it may not be possible to successfully undertake a competitive tendering exercise that would otherwise be required.

- 3.11 For the first two bullet points in 3.9, in most cases authorisation for such procurement actions are at Chief Officer level based on CPR 3.2 which allows Chief Officers to waive the normal requirements of the CPR because of an unforeseeable emergency involving serious disruption to Council services (subject to Agreement with the Director of Corporate Services, the Director of Finance and the relevant Portfolio Holder where the value of the proposed action exceeds £100k, with a report to Audit Sub-Committee in due course).
- 3.14 For the third bullet point – alternative procurement action – this may be desirable where it may not be feasible or recommended to commence a tender or a contract mobilisation process during this period of disruption where the ability of the Council to successfully implement tender actions and the ability of the provider market to respond may be adversely affected. Any tender process at this time, or over the next few months, is less likely to achieve Value for Money or successful procurement outcomes.
- 3.15 The recommended approach for all such contracts is to make use of Regulation 72 (1) of the PCR which allows for contracts to be modified without a new procurement procedure where the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen, that the modification does not alter the overall nature of the contract and that any increase in price does not exceed 50% of the value of the original contract or framework agreement.
- 3.16 In practice, this will most often mean **extending** a contract beyond term, where appropriate and subject to Regulation 72 of the PCR, for a suitable period of time with a view to retendering the contract at a more optimum time. All such extensions will of course need to be agreed with the incumbent provider. For all relevant contracts, Contract Owners and Chief Officers will need to give consideration as to whether an extension should be applied to each of their contracts, whether it delivers Value for Money, the period of time by which the contract will be extended and the procurement or mobilisation strategy and timetable they intend to implement within the additional time available. Such modifications should be deemed necessary, as opposed to convenient.
- 3.16 In the period April to September 2020, a thorough review of contracts was undertaken (via the Procurement Board) and all suitable action was taken during that period to apply alternative procurement action as appropriate. However, it is now suitable to undertake a further review and apply alternative procurement action as necessary in response to the sustained period of disruption (which is now expected to continue into 2021).
- 3.18 The normal authorisation processes to apply a modification extension to a contract as per Regulation 72 of the PCR are covered under CPR 13.1, 23.7.3 and 23.7.4. Modifications to a cumulative value of up to £100k are a Chief Officer decision in Agreement with the Assistant Director of Governance & Contracts, the Director of Corporate Services and the Director of Finance; over £100k it is a Portfolio Holder decision.
- 3.19 Due to the need for pace and the potential volume of decisions that would normally require Portfolio Holder decision via the usual and/or interim democratic decision making processes, it is recommended that delegated authority is granted to Chief Officers during this ongoing period of disruption to take such decisions as required to manage contracts effectively, such delegated authority being subject to the following conditions:
- Agreement with the Assistant Director Governance & Contracts, the Director of Corporate Services, the Director of Finance as normally required through the CPR; and Agreement with the relevant Portfolio Holder for all such modifications where the cumulative value is £100k or higher and would otherwise have been a Member decision. The Portfolio Holder (or Officers) may choose to refer the decision to Members in the normal way where appropriate.
 - That all such decisions are effectively recorded and subsequently reported to Audit Sub-Committee in the normal way;

- That where a decision is a Key Decision, that the Officer decision is published by Democratic Services and subject to call-in before implementation;
- That such delegated authority is granted for a period of six months from 1 December 2020, with any extension to this period, if required, at the discretion of the Leader.

4. MARKET CONSIDERATIONS

- 4.1 The market position may be different from contract to contract. For example, providers in the Social Care market are more likely to be significantly affected by the Covid 19 disruption. The procurement actions described in the report are intended to support all providers, as required, to effectively manage contracts and prioritise their capacity during the period of disruption caused by Covid 19.

5. STAKEHOLDER ENGAGEMENT

- 5.1 Any proposed procurement actions will need to be discussed with the relevant provider to establish the appropriate mechanism to apply. Consideration of the impact on service users and stakeholders should inform such discussions. However, the intent behind the proposal is to provide support and continuity of service to providers, service users and stakeholders and should provide assurance during this period that suitable steps are being taken to ensure support for our service users and provider market.

6. SUSTAINABILITY AND IMPACT ASSESSMENTS

- 6.1 Impact assessments are not expected to be applicable as it is expected that the proposed procurement actions will support continuity of existing services. Impact assessments may be more relevant to subsequent commissioning and procurement strategies.

7. POLICY CONSIDERATIONS

- 7.1 The proposed procurement actions are in line with the Council's Contract Procedure Rules, the Public Procurement Regulations 2015 and recent guidance issued by the Cabinet Office.

8. PROCUREMENT RULES

- 8.1 Procurement implications are covered in the body of the report.

9. FINANCIAL CONSIDERATIONS

- 9.1 There are no direct financial implications arising as a result of the recommendations in this report.
- 9.2 It is anticipated that where any procurement actions are authorised by Chief Officers under the proposed delegations, for example extending existing contracts, they will be contained within existing service budgets.
- 9.3 If a proposed procurement action is anticipated to result in increased costs that cannot be contained within existing service budgets then a supplementary estimate will need to be requested for agreement by the Executive or Leader as appropriate (or Full Council if over £1m).

10. LEGAL CONSIDERATIONS

- 10.1 On April 24 2020, the Leader granted delegated authority to Chief Officers (in Agreement with the Portfolio Holder as required), for a period of six months, to take suitable alternative procurement action to manage contracts in response to disruption caused by the current and ongoing Covid 19 pandemic. The ongoing Covid 19 pandemic and associated Public Health measures continue. This report seeks

further authorisation from Executive, through the Leader, for delegated authority to Chief Officers to take appropriate procurement action to manage Council contracts effectively for a further period of six months from 1 December 2020 following which it may be extended for a further period at the discretion of Executive or through the Leader.

- 10.2 Accordingly the report recommendations are seeking authority from the Executive through the Leader i) to modify decision-making thresholds under the Council's Contract Procedure Rules (CPR's) for a limited period, by delegating to Chief officers (subject to named consultation and rules as to Key Decisions) all decisions that would otherwise have been made by a Portfolio Holder or the Executive in circumstances brought about by the prevailing Covid 19 public health epidemic.
- 10.3 As the senior Executive member, the Leader can take all Executive decisions personally subject to there being pre-decision scrutiny under the present temporary arrangements agreed by the urgency committee and executive. Whereas the contract standing orders (CPR's) are matters reserved to full Council, it is permissible for the Leader vary executive side delegations and suspend aspects of the rules as proposed in the report.
- 10.4 The report explains that the majority of decisions that will fall within the recommended temporary changes to the Council' CPR's will fall within CPR 23.7.4 and 13.1 as being either contract extensions or variations to the terms and conditions or the specification. The reason for this is to enable certainty over continuity of service given concerns over a provider's ability to provide the services or in circumstances where a new procurement exercise would not be sensible due to current and anticipated market conditions brought about by the prevailing Covid 19 public health epidemic.
- 10.5 This supplements decision-making powers available to Chief Officers under CPR 3.2 to waive CPR's where there is an unforeseeable emergency involving immediate risk to persons or property or serious disruption to council services or significant damage or potential damage to the image or reputation of the Council.
- 10.6 As explained in the report the processes and considerations that must be followed in relation to modifications and changes to current contracts and the making of a direct award of a new contract are already catered for within the CPR's which in particular acknowledge the need to comply with the Public Contracts Regulations 2015 (Regulations) - Regulation 32 (direct award) and 72 (modifications during term).The Government have issued the PPN guidance applicable to the use of these Regulations as set out fully in the appendices to the previous report. Officers should note that the underlying principle under the Regulations which should be applied to all public contracts, both above and below threshold, is to treat all economic operators equally and without discrimination and to act in a transparent and proportionate manner. Certain record keeping and public notices may need to be published in accordance with these principles and specific rules which in turn reduces the risk of challenge.

Non-Applicable Sections:	Summary of Business Case Service Profile / Data Analysis Options Appraisal and Preferred Option Procurement and Project Timescales and Governance IT and GDPR Considerations; Personnel Considerations
Background Documents: (Access via Contact Officer)	