
Decision Maker: **Resources, Commissioning and Contract Management
Portfolio Holder**

Date: **5 October 2022**

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

Title: **POLICY: PUBLIC PROCUREMENT UPDATE**

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Chief Officer: Tasnim Shawkat, Director of Corporate Services & Governance

Ward: All

1. Reason for decision/report and options

1.1 This report provides an update and overview to Members on Transforming Public Procurement, now being considered by Parliament as The Procurement Bill.

1.2 This report also notes the need to update the Councils Contract Procedure Rules in due course to ensure compliance with updated Regulations; and it recommends the development of a formal 'Local Procurement Priorities' policy document as a side document to 'Making Bromley Even Better'.

2. **RECOMMENDATION(S)**

2.1 Executive, Resources & Contracts Policy Development & Scrutiny Committee are asked to note the report and provide comment.

2.2 The Resources, Commissioning & Contract Management Portfolio Holder is asked to note the update on Transforming Public Procurement; and to agree the proposed approach for both the development of 'Bromley Local Procurement Priorities' as set out in paragraphs 3.23 to 3.30 and the update of the Councils Contract Procedure Rules as set out in paragraphs 3.31 to 3.37.

Impact on Vulnerable Adults and Children

1. Summary of Impact: N/A
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Transformation Policy

1. Policy Status: New Policy: New legislation in progress
 2. Making Bromley Even Better Priority:

(5) To manage our resources well, providing value for money, and efficient and effective services for Bromley's residents.
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Financial

1. Cost of proposal: Not Applicable:
 2. Ongoing costs: Not Applicable:
 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: Not Applicable:
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Procurement

1. Summary of Procurement Implications: Covered in the scope of this report
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Property

1. Summary of Property Implications: N/A
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Carbon Reduction and Social Value

1. Summary of Carbon Reduction/Sustainability Implications: N/A
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Customer Impact

1. Estimated number of users or customers (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: N/A

3. COMMENTARY

The Procurement Bill - Introduction and Summary

- 3.1 In December 2020, the Transforming Public Procurement Green Paper was published for consultation. In December 2021, Cabinet Office issued the response to the consultation setting out intended amendments to the Green Paper proposals. In May 2022, the Procurement Bill was introduced to Parliament and is currently passing through the parliamentary process before its expected implementation in 2023. The Cabinet Office has indicated there will be at least a six month implementation phase which suggests that the Bill will not become 'live' until late 2023, possibly 2024. This timetable is subject to potential further delays.
- 3.2 This paper provides a summary of key elements of the Procurement Bill. It does not cover the whole scope or detail of the Bill but highlights key areas only.
- 3.3 Currently, public contracting authorities are subject to the UK Public Contracts Regulations 2015 and related Regulations. The Procurement Bill will replace these Regulations. The update to Regulations was prompted in part by the UK's formal exit from the European Union on 31 December 2020. However, this was not expected to lead to fundamental change in the approach to public procurement in the UK which has been borne out in the proposed legislation.
- 3.4 This is because the EU principles, processes and requirements that previously influenced UK legislation were themselves based on World Trade Organisation principles and processes governed through Government Procurement Agreements (GPA). From 1 January 2021, the UK rejoined GPA but as a sovereign state and so the same principles and processes continue to underpin current and proposed UK legislation.
- 3.5 The proposed Procurement Bill can be summarised as follows:
- **Consolidation** – removing duplication by bringing together separate Regulations into a single overarching set of public contracts Regulations;
 - **Clarification** – the redrafting of existing Regulations to provide clarity where appropriate;
 - **Flexibilities** – amendments to existing Regulations to allow some additional flexibilities largely in technical procurement processes;
 - **New Requirements** – additional requirements on contracting authorities, particularly in relation to transparency.
- 3.6 It is important to note that the Procurement Bill is currently going through Parliament and has been subject to a significant number of amendments – around 500 amendments are currently being debated. The final outcome, particularly in the detail, may be different to our current understanding of the content of the Bill. The Bill also refers to secondary legislation which will set out much of the detail of the supporting processes but which is not yet available – these will be crucial to designing compliant processes within Bromley.

The Procurement Bill – Key Elements and Potential Impact on Procurement in Bromley

Consolidation (Low Impact):

- 3.7 The Procurement Bill suggests a single set of Regulations, replacing the four different sets of Regulations that are in place currently: Public Contracts (which are most applicable to the Council), Concession Contracts, Utilities Contracts and Defence & Security.

- 3.8 This is because many of the requirements under each different set of Regulations were similar or identical. The aim, set out in the original Green Paper, of reducing the number of Regulations is largely achieved through this method.
- 3.9 The proposed change is expected to have Low Impact on the Council. Whilst this change is welcome (allowing a single set of Regulations to be referred to), it does not in itself change or reduce the content of the applicable Regulations.
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Clarification (Low Impact):

- 3.10 Some parts of the Bill seek to amend current Regulations to address potential ambiguities or apply a change of emphasis.
- 3.11 Key examples of this include:

3.12 The Principles of Public Procurement:

- 3.12.1 The current Regulations are underpinned by the key Principles of Transparency, Non-Discrimination, Equal Treatment and Proportionality. These are retained with the exception of Proportionality (instead, the Bill retains this in practice via repeated reference throughout the Regulations).
- 3.12.2 In addition to the Principles, the Bill proposes statutory Objectives which include Public Good, Value for Money, Integrity and Promoting the Importance of Open and Fair Competition.
- 3.12.3 The practical distinction between Principles and Objectives is to be established although it is expected that Principles will impose harder-edged obligations. The main departure from current Regulations is the introduction of Public Good. The intent appears to be twofold: firstly, to emphasise the ability of contracting authorities to consider more holistic factors – such as social value – within their evaluation and award criteria; and secondly, to link to the introduction of National Procurement Priorities as a consideration in public procurement. National Procurement Priorities are considered in more detail further in this paper.
- 3.12.4 The impact on Bromley is expected to be low as both Principles and Objectives are currently reflected in similar language through the Councils Contract Procedure Rules and in custom and practice.

3.13 Most Economically Advantageous Tender (MEAT) vs Most Advantageous Tender (MAT):

- 3.13.1 The Procurement Bill proposes that evaluation of tenders moves away from the Most Economically Advantageous Tender (MEAT) to the Most Advantageous Tender (MAT).
- 3.13.2 This amendment is intended to reinforce, add clarity and encourage broader considerations of value, rather than changing the scope of the current principles. It is intended to encourage and give comfort to contracting authorities in taking on social and environmental considerations as part of the evaluation criteria of a tender process.
- 3.13.3 In practice, this is likely to have a low impact on Bromley as we have applied that approach to procurement since the introduction of the Social Value Act 2012. Procurement in Bromley is routinely evaluated on a combination of price and quality which may include social and environmental considerations. The proposed evaluation criteria are normally set out, including the ratio of price/quality, in the supporting Gateway paper prior to commencing procurement.

3.13.4 The devil may be in the detail. An important principle of evaluation is that award criteria must be linked to the subject matter of the contract and this is reconfirmed in the Bill. However, the Bill also indicates that secondary legislation may allow award criteria to be set that do not directly relate to the subject matter of the contract – for example, a suppliers adherence to Net Zero policy across its whole business rather than just relating to the immediate procurement. There are likely to be limitations to this – linked to proportionality – to ensure such approaches do not adversely affect SMEs who may not be competitive against larger suppliers on such measures.

Flexibilities (High Impact):

3.14 The Bill proposes significant changes to current procurement procedures. These do not necessarily reduce or relax existing arrangements but may offer flexibility in designing procurement processes to suit the requirement – albeit likely to be restricted within defined parameters.

3.15 There are four areas of potential new Regulations that require closes attention:

3.16 The ‘Light Touch’ Regime

3.16.1 The current Regulations allow for a ‘Light Touch’ Regime for defined health, social care and education services. The threshold by which the full weight of the Regulations apply is higher than other services; and where the threshold is exceeded, the Regulations allow for flexibilities in the design of the procurement and Notice requirements. However, whether above or below threshold, the procurement must still adhere to the principles of the Regulations and must operate within certain parameters.

3.16.2 It was initially proposed that the ‘Light Touch’ Regime would be removed entirely. This has been fully reversed and the ‘Light Touch’ Regime remains. Initial reading of the Bill suggests that there may be further flexibilities applied to contracts under the ‘Light Touch’ Regime such as when Notices are applicable. The supporting detail may have significant impact as a large volume of Bromley Council contracts fall under this category so the final outcome will be reviewed closely and procedures updated to reflect confirmed changes.

3.17 Healthcare Services and Provider Selection Regime

3.17.1 A separate piece of legislation – the Health and Care Act – suggests that defined healthcare services will be removed from the scope of the Procurement Bill and will be subject to separate Regulations. Progress of this separate legislation has been delayed and the final outcome is to be confirmed. The details of both pieces of legislation and how they complement (and, hopefully, not contradict) each other will need to be reviewed carefully to inform future procedures and robust decision making, ensuring the right procedure is followed for the right services.

3.17.2 The procurement process under the Health and Care Act is titled the Provider Selection Regime and indicates that it will increase the ability of commissioners to vary or extend existing contracts without undertaking a further competitive procedure – where the circumstances allow it. This applies equally to local authorities commissioning healthcare provision, including joint commissioning with healthcare partners. Again, the final detail will need to be reviewed and Contract Procedure Rules and associated guidance updated to reflect the potential flexibilities.

3.17.3 This will have significant impact as there are several healthcare services and contracts that potentially may come under this new regime. This will require careful consideration within future Gateway reports on healthcare services as there will be a different range of options to explore, compared to other services.

3.18 Procurement Procedures

3.18.1 The current Regulations allow for five specific procurement procedures which are prescriptive within the Regulations. These include the Open Procedure (most common), Restricted Procedure (also common), Competitive Procedure with Negotiation, Competitive Dialogue and Negotiated Procedure Without Prior Publication (commonly known as an Exemption to Competitive Tendering, allowable only in limited circumstances).

3.18.2 The Procurement Bill proposes to retain the Open Procedure and the Negotiated Procedure. The Negotiated Procedure is rebranded as the Limited Tendering Procedure and is largely identical but, in response to the Covid 19 pandemic, with additional powers for Ministers to declare 'when action is necessary to protect life' allowing greater flexibility for contracting authorities to use this procedure when such measures are in place.

3.18.3 All other current procedures are removed and replaced with a Competitive Flexible Procedure. It is proposed that this procedure will contain minimal rules other than those needed to ensure compliance with the reformed principles of the new Regulations and Government Procurement Agreements.

3.18.4 Essentially this means that contracting authorities can design the procurement procedure to suit the requirement, albeit within defined parameters.

3.18.5 The introduction of the Competitive Flexible Procedure will have high impact on procurement in the Council and presents both opportunities and challenges. The current procedures are well understood and highly prescriptive; while this does not support flexibility, existing processes and knowledge are based on these, the procedures are common across all contracting authorities, there is a common pathway and the procedures are understood by the market.

3.18.6 By replacing with a Competitive Flexible Procedure, each procurement (that is not Open or Limited Tendering) will need to be designed. This could potentially lead to better designed procurement processes that better fit the needs of the individual requirement with a particular focus on the flexibility to include elements of negotiation across a wider range of tenders.

3.18.7 Balanced against this, there will be a need for more detailed consideration in the planning stage of a procurement process which may lead to capacity and resource pressures. The need to commence planning in a timely manner to allow sufficient 'upfront' time and resource to be committed becomes more critical to the success of a project. To mitigate this, it is expected that over time the Corporate Procurement Team will develop 'template' procedures that can be applied to the majority of tenders. In addition to capacity considerations, there will be the need to consider strategies for market engagement to ensure potential bidders are clear on the requirements of each individual tender. The potential for procurement procedures to differ between contracting authorities and from tender to tender may increase the volume of clarification queries (leading to additional pressure on capacity) as well as the risk of challenge.

3.19 Frameworks and Dynamic Purchasing Systems

3.19.1 The Procurement Bill introduces significant flexibility in the use of framework contracts with the introduction of 'open' frameworks. Currently, frameworks are 'closed', i.e. the providers on the

framework are established through the initial tender process and cannot be changed; the framework itself can be for no longer than four years.

3.19.2 The 'open' framework allows us to appoint new providers to the framework during its term; and the length of the framework can be up to eight years. This could be particularly beneficial when considering future arrangements for current Bromley frameworks such as Passenger Transport or Domiciliary Care.

3.19.3 Similarly, additional flexibilities may be allowed in the use of Dynamic Purchasing Systems (rebranded as Dynamic Markets). While the rules of application look similar, the scope for use of Dynamic Markets may be broadened. Further analysis needs to be undertaken to determine what opportunities may arise here – further guidance is expected.

New Requirements (High Impact):

3.20 The Bill places significant new burdens on contracting authorities which will require changes to many of our key processes. Most of these are linked to increased transparency requirements. This is likely to have a high impact on the Council, not only in terms of additional pressure on capacity, resource and planning but also the potential for increased risk of challenge. Key examples include:

3.21 Notices

3.21.1 Under the current Regulations, the Council has to publish procurement Notices on designated Government websites with strict compliance on content and timescales. The current requirements are that we publish Tender Notices (excluding lawful exceptions) and Contract Award Notices. This applies to any contract of £25k or over. In addition, optional notices can be made such as Prior Information Notices (alerting the market to upcoming tenders) or VEAT Notices (notifying the intent to award a contract without competition).

3.21.2 Under the Bill, there is a significant increase in the Notices required. The full detail of what is required under each Notice – content and timescales - is to be confirmed through secondary legislation, but the new requirements are:

- Planning Notice – this appears to be optional and similar to a Prior Information Notice, i.e. informing the market of an upcoming opportunity.
- Preliminary Market Engagement Notice – this appears to be optional and is intended to inform the market of market engagement events prior to a tender.
- Pipeline Notice – this is a significant new requirement and is not optional. Contracting authorities who spend more than £100m on contracts in a financial year (which includes local authorities) are required to annually publish a pipeline notice containing information on all upcoming tenders planned over the next eighteen months with a value of £2m or higher.
- Tender Notice – not optional, broadly as per the current requirements, stating that the authority is tendering for an opportunity.
- Contract Award Notice – not optional, broadly similar to the current requirements stating that the authority intends to award a contract.

- Procurement Termination Notice – not optional, required if the authority decides not to award a contract where a Tender Notice has been made.
- Contract Detail Notice – this is a significant new requirement and is not optional. The authority must publish to confirm, with details, that a contract has been entered into. For contracts over £2m, a copy of the contract must be published, redacted as appropriate.
- Contract Change Notice – this is a significant new requirement and is not optional. The authority is required to publish a Notice for a modification to a contract unless below a stated value. This would include formal extension options.
- Payments Compliance Notice – this is a significant new requirement and is not optional. The authority must issue a Notice, with detail, every six months setting out payments made for each relevant contract.
- Transparency Notice – not optional, this is required where an authority proposes to award a contract via exemption to competitive tendering.
- Dynamic Market Notice – not optional, the authority must make Notices before and after establishing a Dynamic Market arrangement as well as Notices for any modifications or cessation.
- Contract Performance Notices – this is a significant new requirement and is not optional. For contracts over £2m and annually, the authority must publish Key Performance Indicators for each contract and the providers performance against them. In addition, the authority must publish Notices where breach of contract has occurred or failure to remedy poor performance.
- Contract Termination Notices – not optional, the authority must publish Notices where a contract has been terminated. This includes where a contract has reached the end of its term, i.e. every contract will require a Contract Termination Notice.

3.21.3 As can be seen from the lengthy list, these are significant new burdens on the Council. The new Notice requirements are not simply additional administrative requirements covered through the Corporate Procurement Team. They have implications for commissioners in ensuring planning is effective to comply with Pipeline Notices; for finance colleagues in ensuring new processes and reporting procedures are in place for Payments Compliance Notices; for Contract Owners and Legal colleagues in determining the details of contracts to be published and which much be redacted; and, most significantly, for Contract Owners in managing Notices for contract performance and Key Performance Indicators. Given the public nature of these Notices, it is anticipated that this may lead to challenges in contract management and provider relationships; providers are more likely to contest performance monitoring where there is an increased risk of reputational damage. Finally, there is an overall increased risk of ensuring compliance and the associated audit requirements or reputational damage in not doing so.

3.22 Contract Award Assessment Summaries

3.22.1 Currently, prior to issuing a Contract Award Notice each tenderer is sent a Feedback letter informing them of whether they have been successful or unsuccessful in their bid. The Feedback letter informs them of the strengths and weaknesses of their bid, summarised from the evaluation process. A Contract Award notice is then made and the 'standstill' period commences.

3.22.2 The new Regulations replaces this with an Assessment Summary. The full detail is to be established through secondary legislation but it is understood that this not only involves more

detailed information on the evaluation of their bid (including potentially evaluators notes) but also similar detail for the winning bid.

3.22.3 The full detail of the new requirements are to be confirmed but it is likely to require greater care, time and resource in the management and recording of the evaluation process to ensure that suitable and appropriate records are provided to each tenderer. The potential risk of challenge may also be higher.

Local Procurement Priorities

3.23 In June 2021, Cabinet Office issued a Procurement Policy Notice setting out National Procurement Priorities and requiring contracting authorities to have regard to these when carrying out public procurement (alongside any additional local priorities).

3.24 This requirement is now included within the Procurement Bill, including the introduction of Public Good as an objective and clarifications on areas such as MAT as set out in paragraphs 3.10 to 3.13. Consideration of National Procurement Priorities should be reasonable and proportionate and within the parameters of current and proposed legislation (so there are limitations).

3.25 The National Procurement Priorities are set at a top level of detail only and largely restate the requirements of the Social Value Act 2012 (and so are aligned with our current local priorities):

- Creating new businesses, job and skills.
- Tackling climate change and reducing waste.
- Improving supplier diversity, innovation and resilience.

3.26 Contracting authorities are asked to give regard to these priorities when considering the specification of services and evaluation criteria for award of contract. In addition, authorities are asked to consider their policies and processes for managing procurement projects and whether they have the right organisational capability and capacity.

3.27 The introduction of National Procurement Priorities does not necessitate significant change in Bromley procurement practice or priorities. Consideration of social value elements has been long established and set out within a Social Value policy alongside other local priority documents such as 'Local Rules OK' for considering local and SME suppliers. Related policies are currently being considered by Members and will be developed further and incorporated into procurement practice. The Contract Procedure Rules already align with the principles and objectives of the new legislation including the Gateway process which underpins procurement decisions and strategies.

3.28 However, this is an opportunity to refresh and restate our Local Procurement Priorities. This is not starting from scratch – as set out in 3.27 we already have a range of policies and guidance in place or in development, such as with Net Zero. It is proposed to collate these into a single overarching document that sets out our priorities at a top level, with links to supporting policy, guidance and further detail as required. The overarching document is intended to sit within 'Making Bromley Even Better' as a side document.

3.29 The suggested high level Local Procurement Priorities – underpinned by the principles of relevance, proportionality, practicality and with regard to capacity and resource - are:

- Value for Money.
- Effective Governance, including compliance and management of risk.
- Transparency.
- Social Value:
 - Economic – supporting the local economy (including employment and apprenticeship opportunities) and SMEs
 - Environmental – seeking to minimise environmental impacts of goods, services and works purchased, including Net Zero policy
 - Social – supporting local voluntary and community services, groups and projects, engaging with service users, managing supply chains to ensure human rights and employment standards are met (Modern Slavery).

3.30 The proposed approach for agreeing a Local Procurement Priorities document is for the lead Officer to draft a Local Procurement Priorities document in consultation with Chief Officers, the Portfolio Holder and the ER&C Chairman. The draft will initially be based on existing policy (updated as necessary), emerging policy (such as Net Zero) and the requirements of the Procurement Bill. Once completed, the draft will be discussed at ER&C PDS for further revision and iterations, leading to an agreed version. This will then be formatted and presented in line with 'Making Bromley Even Better' and a final version agreed and published. If the approach is agreeable, a timetable will be developed. If broader engagement (such as one to one or group meetings, either in person or virtually) with Members of ER&C PDS is preferred in preparing the initial draft, this can also be arranged.

Contract Procedure Rules

- 3.31 The Councils Contract Procedure Rules (CPR) form part of the Financial Regulations which, in turn, form part of the Constitution of the Council. They also fulfil the requirement of the Local Government Act 1972 (and subsequent amendments) to have standing orders in place for public procurement. They set out the rules for conducting procurement in Bromley, including governance of procurement decisions
- 3.32 The content of the CPR mainly reflects the principles, objectives, processes and requirements of relevant legislation, primarily the Public Contracts Regulations 2015, the Social Value Act 2012 and other statutory requirements such as Transparency Regulations. As a result, the CPR will need to be updated in due course to reflect the new requirements of the Procurement Bill. The timetable for this will be dependent upon the progress of the Bill and the publication of primary and secondary legislation as well as supporting statutory guidance.
- 3.33 As well as reflecting the Regulations, the CPR sets out the key governance processes for procurement in Bromley alongside other areas such as competition requirements for below threshold procurements (i.e. below the threshold by which the full weight of Regulations apply but which are still subject to the Regulations). These can be revisited and updated at the same time.
- 3.34 In 2020, a substantial amount of work was done on updating the CPR to the stage at which a full new draft was prepared, informed by Member and Officer engagement. This was put on

hold once the Procurement Green Paper was announced as it was clear that any update needed to reflect the new legislation.

- 3.35 It is proposed to use that draft as a starting point to commence a process of updating the CPR, the timetable for completion linked to the progress of the Procurement Bill and its subsequent implementation period.
- 3.36 One of the principles of the draft was to restructure the CPR to address the feedback that it was a complex and lengthy document and not laid out in an intuitive fashion. The intent was to make it shorter, simpler, clearer, and focused on the core principles and objectives of value for money, fairness, and transparency, underpinned by strong governance arrangements with clear roles and responsibilities. The detail currently in the CPR – the technical procedures and processes of procurement – would instead be covered in supporting Technical Guides.
- 3.37 As it is the Technical Guides that will be largely derived from the detail of the Procurement Bill, this will allow consideration of the main body of the CPR sooner (but with a final decision still dependent upon the timetable of the Bill). As above, the suggested approach is for the lead Officer to draft a revised CPR, based on the work already undertaken, and in consultation with Chief Officers, the Portfolio Holder and the ER&C Chairman. Once completed, the draft will be discussed at ER&C PDS for further revision and iterations, leading to an agreed version in due course and subject to the progress of the Procurement Bill. If the approach is agreeable, a timetable will be developed. If broader engagement (such as one to one or group meetings, either in person or virtually) with Members of ER&C PDS is preferred in preparing the initial draft, this can also be arranged.

<p>Non-Applicable Headings:</p>	<p>Impact on Vulnerable Adults & Children Property Implications Procurement Implications Carbon Reduction / Social Value Implications Customer Impact Transformation/Policy Implications Financial Implications Personnel Implications Legal Implications Ward Councillor Views</p>
<p>Background Documents: (Access via Contact Officer)</p>	<p>The Procurement Bill Contract Procedure Rules Local Rules OK Sustainable Procurement Policy Carbon Management Programme Update</p>